

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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[fol. a]

**IN THE UNITED STATES DISTRICT COURT, EAST-
ERN DISTRICT OF KENTUCKY AT COVINGTON**

No. 10245

(Title 18, Secs. 371 and 2113, USC)

UNITED STATES OF AMERICA,

vs.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, KENNETH
RAY STRUNK, CHESTER CLARK.

INDICTMENT—Filed March 13, 1961

Count 1

The Grand Jury Charges:

That beginning on or about December 10, 1960, and continuing up to and including January 20, 1961, in Campbell County, in the Eastern District of Kentucky, and in other places to the Grand Jury unknown, John Richard Sykes, John Brenton Preston, Kenneth Ray Strunk, and Chester Clark, defendants herein, did wilfully, knowingly and unlawfully combine, conspire and agree with each other and with other persons to the Grand Jury unknown, to commit an offense against the United States, to-wit, to rob the Union Bank of Berry, Berry, Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation under Certificate No. 5851, an offense prohibited by Title 18, Sec. 2113, United States Code.

That in furtherance of the aforesaid conspiracy and to accomplish the objects thereof, the defendants committed numerous overt acts, among which were the following:

1. On or about December 10, 1960, John Richard Sykes purchased a .38 caliber pistol from Elmer Joyce Gun Shop, 405 Madison Street, Covington, Kentucky.

[fol. b] 2. On or about January 18, 1961, Kenneth Strunk purchased from Bernard M. Hedges, proprietor of a gen-

eral store, Berlitz, Kentucky, two caps to be used as a part of disguise.

3. On or about January 17, 1961, John Brenton Preston and John Richard Sykes by deceit procured from Vincent Stricklen, used car dealer, Newport, Kentucky, an automobile to be used in the robbery, which car was purchased on January 19, 1961, by John Richard Sykes in the name of his wife, Elizabeth Sykes.

4. On or about January 20, 1961, John Richard Sykes, John Brenton Preston and Kenneth Strunk had in their possession a falsely made Kentucky license tag, two pistols, a stocking mask, four caps, pillow cases, ammunition, two pair of gloves, rope and cord, paraphernalia to be used in the execution of said bank robbery.

5. On or about January 8, 1961, John Richard Sykes and Kenneth Strunk were in Berry, Kentucky, for the purpose of observing said bank.

A true bill.

_____, _____, Foreman.

Jean L. Auxier, United States Attorney.

[fols. c-d] IN THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF KENTUCKY AT COVINGTON

No. 10245

UNITED STATES OF AMERICA,

vs.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, KENNETH
RAY STRUNK, CHESTER CLARK.

MOTION TO SUPPRESS EVIDENCE—Filed March 16, 1961

Comes now defendants, John Richard Sykes, John Brenton Preston and Kenneth Ray Strunk, by their attorneys, and move this Court for an order suppressing the following evidence:

One (1) falsely made license tag, two pistols, a stocking mask, four (4) caps, two (2) pair gloves, and rope

and cord. (all being the same named in Specification 4, overt acts in indictment).

for the reason that said evidence was illegally obtained as a result of an unreasonable search and seizure, in violation of the constitutional rights of defendants.

Robert D. Leggett, John R. Elfers, Attorneys for Defendants.

Testimony will be offered on motion.

I certify that a copy of this motion was delivered to the United States Attorney the date same was filed.

Robert D. Leggett, John R. Elfers, Attorneys for Defendants.

**[fol. e] IN THE UNITED STATES DISTRICT COURT, EASTERN
DISTRICT OF KENTUCKY AT COVINGTON**

No. 10,254

UNITED STATES OF AMERICA, Plaintiff,

v.

**JOHN RICHARD SYKES, JOHN BRENTON PRESTON, KENNETH
RAY STRUNK, Defendants.**

**Transcript of Evidence and Proceedings—March 14 and
March 16-18, 1961**

Before: His Honor, Mac Swinford, Judge of Said Court.

APPEARANCES:

**For the Plaintiff: Mr. Jean Auxier, United States Attorney,
Mr. N. Mitchell Meade, Assistant U. S. Attorney.**

**For the Defendants: (By appointment of the Court)
Mr. Robert Leggett, Newport, Kentucky, Mr. John R. Elfers,
Covington, Kentucky.**

**[fol. 1] (Reporter's note: On March 14, 1961, at the call
of the docket, case No. 10,245, United States of America v.
John Richard Sykes, John Brenton Preston, and Kenneth
Ray Strunk, was called, the defendants came before the
Court and received copies of the indictment and the fol-
lowing occurred:)**

The Court: John Richard Sykes.

The Defendant Sykes: Yes, sir.

The Court: John Brenton Preston.

The Defendant Preston: Yes, sir.

The Court: Kenneth Ray Strunk.

The Defendant Strunk: Yes, sir.

**The Court: Do each of you men have a copy of this in-
dictment handed to you?**

The Defendant Strunk: Yes, sir.

**The Defendants Sykes and Preston: (Indicating in the
affirmative)**

The Court: Do you have an attorney?

5.
The Defendant Strunk: No, sir.

The Defendant Sykes: No, sir.

The Court: None of you have an attorney. Would you like to have an attorney represent you?

The Defendant Sykes: Yes, sir.

[fol. 2] The Court: Do you have money with which to employ one?

The Defendant Sykes: No, sir.

The Court: You are speaking for all three of you, I suppose.

The Defendant Sykes: Yes, sir.

APPOINTMENT OF COUNSEL FOR DEFENDANTS

The Court: And you would like to have an attorney represent you. I am going to appoint Mr. Leggett.

Mr. Leggett, are you in a position to take appointment as counsel in this case?

Mr. Leggett: Yes, Your Honor, I am.

The Court: All right. I am going to appoint you and I am going to appoint Mr. Elfers.

Call Mr. Elfers in here a minute, Mr. Marshal.

(Reporter's note: Mr. John R. Elfers came before the Court and the following occurred:)

The Court: Mr. Elfers, I am going to appoint you and Mr. Leggett to represent these men in this case. They have copies of the indictment and the case is set for trial Thursday morning at 9 o'clock, the day after tomorrow.
[fol. 3] How long have you been in jail?

The Defendant Preston: Since January the 20th.

The Court: I would like for you to get ready and try the case.

Mr. Leggett: We will be prepared at that time.

The Court: All right. They are in custody.

Just a minute. I am going to let you confer with your clients; gentlemen, and then I will call them back for arraignment. They have not been arraigned yet and I want you to confer with them before they are arraigned and then we will bring them back here for arraignment and determine what their plea will be. (Reporter's note: Subsequently, on the same day, the defendants having conferred

with counsel, the defendants came before the Court with their attorneys, Mr. Leggett and Mr. Elfers, and the following occurred:

ARRAIGNMENT AND PLEAS

The Court: (Reading indictment to the defendants) Now, John Richard Sykes, do you understand that charge against you?

The Defendant Sykes: Yes, sir.

The Court: Are you guilty or not guilty?

[fol. 4] The Defendant Sykes: Not guilty, sir.

The Court: John Brenton Preston, do you understand that charge against you?

The Defendant Preston: Yes, sir, I understand it.

The Court: Are you guilty or not guilty?

The Defendant Preston: No, sir. I am not guilty.

The Court: Kenneth Ray Strunk, do you understand that charge against you?

The Defendant Strunk: Yes, sir, I do.

The Court: Are you guilty or not guilty?

The Defendant Strunk: Not guilty.

The Court: Plea of not guilty.

What says the United States?

Mr. Auxier: We have the witnesses summoned for Thursday.

The Court: Will you be ready for trial at that time? What says the defendants?

Mr. Elfers: We are ready for trial.

[fols. 5-8] The Court: Case set down for trial, Thursday morning, at 9 o'clock.

(Reporter's note: Subsequently, on March 16, 1961, the defendants were present with their counsel. A jury was regularly impaneled, accepted and duly sworn. The following then occurred;)

Mr. Leggett: May we have permission to approach the bench, Your Honor?

The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Leggett: We have a preliminary motion which we would like to file at this time. We would like to have it heard out of the hearing of the jury.

There are three witnesses present who will testify on this motion. Their testimony should take maybe 15 minutes.

The Court: All right, sir. I will give you an opportunity to be heard.

Thereupon the Colloquy at the Bench Ended)

[fol. 9] EVIDENCE ON MOTION TO SUPPRESS

HENRY COLSTON, being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Your name is Henry Colston?

A. Yes, sir.

Q. You are an officer of the Newport police force?

A. Yes, sir.

Q. Were you so employed and assigned on the 20th day of January, 1961?

A. Yes, sir.

Q. On the morning of the 20th of January, did you have [fol. 10] occasion to see the three defendants in this case?

A. I did.

Q. Approximately what time was that?

A. That was approximately 3 a.m. in the morning.

Q. And where did you see them?

A. At 10th and Monmouth, in the City of Newport.

Q. Now, were you alone or were you with another patrolman at that time, Officer?

A. I was with another patrolman.

Q. What if anything did you do with these defendants at the time you saw them?

A. We questioned them along with two detectives who were with us and placed them under arrest.

Q. You placed them under arrest?

A. Yes.

Q. May I ask what charge you placed against them?

A. We charged them with vagrancy.

Q. Vagrancy?

A. Yes, sir.

[fol. 11] Q. Did you then remove them to the Newport police station?

A. We did.

Q. I will ask you what, if anything, you did with respect to the automobile which they had after you removed them from it to the Newport police station?

A. We impounded their automobile and took it to police headquarters also.

Q. I will ask you to state whether or not you looked in that automobile to ascertain what was in it?

A. I did not.

Q. You did not?

A. At the time, no.

Q. Were you present when some one did look in that automobile?

A. Yes, sir.

Q. Who was—who looked in there?

A. Detective Ciafardini.

Q. Ciafardini?

A. Yes, sir.

Q. I will ask you to state whether or not Officer Dotson made any search of that automobile.

[fol. 12] A. He was present on the street but he wasn't in the vicinity when we looked in the automobile at the time I was there.

Q. I will ask you to state whether or not you opened the trunk of this automobile.

A. I did not.

Q. Did you see who opened it?

A. I did not.

Q. When was this search of the automobile made, officer?

A. Immediately after we got to headquarters, within 15 minutes, I would say.

Mr. Leggett: I have no further questions of this witness.

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Cross-examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney.

Q. Can you tell the Court why you arrested these men for vagrancy?

A. Well, in the investigation, talking to them, none of them were employed and they were in the vicinity for some time. Some of them hadn't been employed for six months, one or two of them, so we arrested them for vagrancy. [fol. 13]

Q. Did they have any money on them?

A. I think some small change is all.

Q. Do you know how long they had been parked there in that vicinity?

A. Exactly, no. We were told approximately five hours.

Mr. Leggett: Now, if the Court please, I will object and move that be stricken on the basis that it is obviously hearsay.

The Court: I sustain the objection.

Q. Had you received complaints prior to the time that you accosted them there on the street?

A. Well, we were sent there by the office. The office received a complaint.

Mr. Leggett: Again, Your Honor, I will object and move that be stricken on the basis it is hearsay.

The Court: No, he didn't say anything. He just said they were sent there.

[fol. 14] Mr. Leggett: I think he said the office received a complaint and that part of the testimony I was concerned with.

The Court: He said he was sent there by the office. The Court will not consider any hearsay evidence.

Q. Did they give you any excuse as to why they were there on the street at that hour of the morning?

A. They told us they was waiting for a truckdriver, a man who was driving a truck, from Lexington going to Newport.

Q. Did they tell you what trucking company?

A. They didn't know what trucking company.

Q. Did they know what time he would be through?

A. No. They didn't know what time he would be through.

Q. Did they know what route he would be taking?

A. They said he would come through Newport on 27, that is all they knew.

[fol. 15] Q. After you arrested them in that automobile, did you search the automobile at that time?

A. We didn't search the automobile until we was at headquarters.

Q. Did you take the men and the automobile to the police headquarters after their arrest?

A. Yes, sir.

Q. Did you book them on any charge then after you got them in police headquarters?

A. Booked them on vagrancy.

Q. Was the automobile searched by you after they reached police headquarters?

A. I was present when Detective Ciafardini went down and looked inside the automobile.

Q. Do you know of your own personnel knowledge why Detective Ciafardini went out to the automobile?

A. One of the defendants had requested permission to go down and get some cigarettes.

Q. Did you grant him permission to go get the cigarettes?

A. The officer in charge did not.

Q. Did you offer to go get the cigarettes for him?

[fol. 16] A. I was with Detective Ciafardini when he went down.

Q. Did you help one of the other patrolmen or detectives search the trunk of the automobile later?

A. No, I wasn't present when that was done.

Mr. Meade: All right.

The Court: What time of night was this?

A. It was approximately 3 o'clock in the morning, 3 a.m.

The Court: Where was it?

A. We first were sent to 10th and Monmouth Street in Newport.

The Court: Tenth and Monmouth?

A. Yes, sir.

The Court: What kind of a section of town is that? What is the nature of that section of the town of Newport?

A. It is a business section, stores and stuff of that nature.

The Court: And you went there and placed a charge [fol. 17] against them for vagrancy and placed them under arrest and took their automobile into your custody at that time. Is that right?

A. Yes, sir.

The Court: And that was under the direction of your superior officer?

A. We were sent to this location by the office; yes, sir.

The Court: And had this car been in the possession of these defendants for some time before that?

A. The office sent us there to investigate occupants of a car parked at 10th and Monmouth, who had been setting there for some time. That is what we were told.

The Court: How long had it been setting there?

A. We were told five hours.

The Court: Five hours?

A. Yes, sir.

The Court: I understood you to say that these men had been under observation or you had knowledge of them some six months, I believe you say, without doing anything. What was that? Just tell me that again.

[fol. 18] A. Upon questioning them, they were unemployed, one of them stated he had been unemployed for six months, the last time he worked was June.

The Court: Well, had you observed them prior to this time, before this time, any time? Had you seen them around there?

A. To my knowledge, I had never seen either one of them before.

The Court: Your office, as I understand you to say, had gotten complaints?

A. Yes, sir.

The Court: How many times?

A. That I could not tell you. I don't know.

The Court: You were just carrying out the instructions of your superior?

A. Yes, sir.

The Court: All right.

Cross-examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. To get something straight for the Court, your complaints were that night only, were they not?

A. To the best of my knowledge, yes, sir.

[fol. 19] The Court: Well, what were the complaints?

A. Like I say, we were sent to investigate occupants of a car who had been parked for some time in this vicinity and acting suspicious. That is what we were sent up for.

The Court: Did they say what the actions were that might arouse suspicion?

A. Well, they said that they just set around, one of them got out of the car and left and then came back. That was all.

The Court: All right. Stand aside.

You did not search the car until you had placed them under arrest and taken them to the police station, is that right?

A. That's correct. Yes, sir.

The Court: Who drove the car down there?

A. It was one of the officers.

The Court: One of the officers.

A. I don't know which one.

The Court: Where did the defendants go? Did you have [fol. 20] the police station wagon there?

Q. My partner and I took the defendants down in our cruiser.

The Court: And then one of your associates, one of your police officers, drove their car?

A. Yes, sir.

The Court: How far was it?

A. Approximately eight blocks.

Redirect examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Officer Colston, weren't they parked at the immediate vicinity of the Glenn Rendezvous?

A. It wasn't immediate. It was in the vicinity. It was up the street from the Glenn.

Q. And that establishment is open at that time in the morning?

A. I think it closes at 3 o'clock.

Mr. Leggett: I have no further questions.

The Court: All right. Stand aside.

What kind of place is the Glenn Rendezvous?

[fol. 21] A. It is kind of a night club like.

The Court: Night club?

A. Night club, yes, sir.

The Court: All right. Stand aside.

Mr. Leggett: Call Detective Ciafardini.

PAT CIAFARDINI, being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Robert Leggett, Counsel for the Defendant:

Q. State your name please.

A. Pat Ciafardini.

Q. You are a detective on the force of the Newport Police Department?

A. That's correct.

Q. You were so employed and assigned on the 20th day of January, 1961.

A. That is correct.

Q. At that time and on that date did you have occasion to see the three defendants who are seated here at this table?

[fol. 22] A. Yes, sir.

Q. I will ask you to state to the Court the circumstances under which you saw these men.

A. We were given a dispatch by the police radio, in our cruiser, sent to 10th and Monmouth where they were three men acting suspiciously in a Buick coach.

Q. I will ask you to state whether or not Officers Colston and Dotson were present at that time also.

A. Yes, sir.

Q. And your partner was Detective Quitter?

A. That is right.

Q. Among the four of you, some one of you placed these men under arrest at that time?

A. That is right.

Q. What charge was placed against them?

A. Vagrancy.

Q. What if anything did you do after they were arrested?

A. Well we talked to them and asked them what were [fol. 23] they doing there.

Q. Then did you remove them to the Newport police station?

A. No. John Sykes said that he was waiting for a man

named Sexton, who was supposed to be coming in from Lexington.

Q. Now, Detective Ciafardini, after this question and answer period, then did you take them down to the police station for the purpose of booking?

A. After we talked to them.

Q. And after you arrived at the police station, did you book them on the charge of vagrancy?

A. That is correct.

Q. And after you booked them on this charge, did you have occasion to examine this 1955 Buick automobile?

A. After we had booked the three, Sykes asked if he could go down to his car to get some cigarettes. We already had booked them and was placing them back in the back of the jail and I went down with Officer Colston and Dotson. We looked on the seat, no cigarettes. We looked up on the dash, no cigarettes. I put my thumb on the glove compartment, opened it up and there were two loaded revolvers in there.

[fol. 24] Q. Did you find any cigarettes in there?

A. No, sir.

Q. Then you removed these revolvers from the automobile?

A. That is right.

Q. Now, the glove compartment was not locked at the time you opened it?

A. No, sir.

Q. Did you have occasion to examine the contents of the trunk of that automobile?

A. Well, I had got the guns and went back up, but before we went back up, I had the keys to the automobile and I went around and tried them in the trunk and we couldn't open it with the set of keys that Sykes had for the automobile. So we brought the guns back up and I asked Dotson to go back down and see if he can't get into that trunk and which he did.

Q. And Officer Dotson was the one that opened the trunk of the automobile?

A. He opened it from taking the rear seat out and when he opened that up, that is when he found the masks and the rope, the tape, the hats.

Q. Now, these items which you have named, these guns [fol. 25] and these other items, those are all exhibits which have been turned over to the Federal Bureau of Investigation, is that correct?

A. That's correct.

Q. Now, subsequent to your finding these loaded weapons in this automobile, did you place another charge against these defendants?

A. For carrying a concealed and deadly weapon, yes.

Q. And that also was docketed in the Newport Police Court, is that correct?

A. That's correct.

Mr. Leggett: I have no further questions.

Cross examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Detective Ciafardini, will you tell us why you booked these men for vagrancy?

A. Yes, sir. When we were questioning them, their answers were evasive. They couldn't give us the right answers. They didn't know the make of the truck that was coming in and what time this fellow Sexton was supposed to come in and we asked them about—"Well, how [fol. 26] do you know, how are you going to see the guy?" They said, "Well, he usually stops down at one of the restaurants a square below, which on one side is the "Minute Chef" and the other side is a "Crystal Chili Parlor".

Q. Did you ask them what they were doing that far away if the fellow was supposed to stop at the other location?

A. Yes, sir.

Q. Did they give you any answer?

A. Evasive again. That is why we "vagged" them.

Q. Did they have any funds on their person?

A. Twenty-five cents between the three.

Q. Did you question them as to employment?

A. Yes, sir.

Q. What did they tell you?

A. Strunk said he hadn't worked for six months and the other two said they hadn't been working.

Q. Did anybody tell you who owned the automobile?
[fol. 27] A. Sykes said that he had purchased the automobile that day or the day before, but he had no papers to show that the automobile was owned by him.

Q. When you took them to police headquarters—you took them to police headquarters and booked them on that charge?

A. Yes, we did.

Q. After you found the guns in the glove compartment, did you place any additional charge against them?

A. Yes, sir.

Q. What charge?

A. Carrying concealed and deadly weapons.

Q. Which side of the automobile was the glove compartment on in that automobile?

A. To the right.

Q. Righthand side. You found no cigarettes in the car, out in the open anywhere?

A. No, sir.

Q. Could the glove compartment be reached by a person sitting in the right front seat?

A. Yes, sir.

[fol. 28] Q. Did you find any articles of any nature on the persons of any of the defendants?

A. Detective Quittier found a long cord string that is used for binding, on one of them, Preston.

Mr. Meade: That is all the questions I have.

Questions by the Court:

Q. Detective, how did you happen—who sent you there to that spot that night?

A. Lieutenant Bishop, sir.

Q. Was that as a result of a call?

A. Yes, sir.

Q. A telephone call?

A. Yes, sir.

Q. At that time?

A. Yes, sir.

Q. Do you know the contents of that call? What did he tell you? Did he say anything to you?

A. Just over the radio, to check that automobile up at [fol. 29] Tenth and Monmouth, there were three suspicious men in it, acting suspicious.

Q. Did you go there immediately to that—

A. Yes, sir.

Q. What part of the city is that? Where there are night clubs or something of that kind, that has to be policed pretty carefully?

A. Yes, sir. At 10th and Monmouth, where their automobile was parked, was a Shell oil station, but it was closed. Then right next to the Shell oil station is a cigar store. Then across the street is a cafe, Chalker's (phon.) Cafe, at Tenth and Monmouth. Then there is a dry cleaning plant next to it and a butcher shop, then the Tropicana night club. And then to the right again there is a hardware store, further down a jewelry store, further down—

Q. Is the Glenn Rendezvous in the neighborhood?

A. Yes, sir. That is right in the center of the square. Well, that is the Tropicana.

Q. Now, you say—did they give you—you are an experienced detective of many years, aren't you?

A. Fourteen.

[fol. 30] Q. Did you observe them any way when you went up to them, before you went up to them? You said, I believe, that they were acting suspicious?

A. No, sir—

Q. Or something of that kind?

A. No, sir. We just drove right on up.

Q. And questioned them?

A. Yes, sir.

Q. Did their answers or demeanor at the time you questioned them arouse your suspicions?

A. Yes, sir.

Q. Your suspicions for what? What kind of suspicions?

A. Were up for no good.

Q. Had you ever seen that car around there before?

A. No, sir.

Q. Had you ever seen these men before?

A. No, sir.

Q. Were they in the car when you went up to them or were they on the sidewalk near the car?

[fol. 31] A. The two, Strunk and Preston, were already getting out of the car and Sykes was still at the wheel and I ordered him out.

Q. How long had the car been standing there, if you know?

A. Well, the way we got the call it was there for several hours, Your Honor.

The Court: All right. That is all. You will have to wait outside.

Mr. Leggett: Call Officer Dotson.

GEORGE DOTSON, being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Robert Leggett, Counsel for the Defendants.

Q. Your name is George Dotson?

A. Yes, sir.

Q. You are an officer in the Newport City Police Department?

A. Yes, sir.

Q. You were so employed and assigned on the 20th day of January, 1961?

A. Yes, sir.

[fol. 32] Q. Did you have occasion in the early morning of January the 20th, to see the defendants, these men who are seated over here (indicating)?

A. Yes, sir.

Q. I will ask you to state to the Court when and where you saw these men.

A. It was at Tenth and Monmouth at the northeast corner of Tenth and Monmouth Street.

Q. Now, did you go to that location in response to a radio call?

A. Yes, sir.

Q. And at the time you arrived there, what if anything did you find?

A. We found three men sitting in a car.

Q. What kind of car were they seated in?

A. They were in a Buick.

Q. And was Detective Ciafardini and Quitter also present there?

A. Yes, sir.

Q. Did you arrive first or did the detectives arrive first?

A. We both arrived at the same time.

[fol. 33] Q. About the same time?

A. Yes, sir.

Q. Now, after having conversation with these defendants there, did you place them under arrest?

A. Yes, sir.

Q. And did you then remove them to the Newport Police Station?

A. Yes, sir.

Q. After arriving at the Newport Police Station, did you then book them or charge them?

A. Yes, sir.

Q. And what did you charge them with?

A. Right then we charged them with vagrancy.

Q. Now, directing your attention to this 1955 Buick, Officer, did you have occasion to make an examination of the contents of the trunk of that automobile?

A. Yes, sir.

Q. I will ask you to state to the Court what you found when you made this examination.

[fol. 34] A. Is it all right if I read it off the report, sir?

Q. Was that prepared at the time?

A. Yes, sir.

Q. It is all right.

A. Yes, sir. We found in the trunk of the Buick articles, one blue cap, one khaki cap, one black and white checked cap, one blue and ivory cap, two ladies stockings, upper half tied in a knot at the end, one with eye holes, and five band-aids; one pair of leather gloves, one pair of white work gloves, one sock, two pieces of rope, a length of fishing cord, two white pillow slips and a 1961 Kentucky license plate, No. 824-101.

Q. I will ask you to state how you gained access to the trunk of this automobile, Officer.

A. We had to go through—remove the back seat and crawl in through the back.

Q. Then the trunk was locked so you could not open it otherwise, is that correct?

A. That is true, sir.

Q. Now, you made this search after these men were booked for vagrancy, is that correct?

A. Yes, sir.

[fol. 35] Q. Were you present when Detective Ciardini made a search of the automobile?

A. Yes, I was.

Q. And did you see what he found in that automobile?

A. Yes, sir, I did.

Q. I will ask you to state whether or not you found any cigarettes in this automobile.

A. No, sir. There was no cigarettes at all in the automobile.

Mr. Leggett: You may inquire.

Cross-examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Mr. Dotson, how long have you been with the police force?

A. Going on nine years, sir.

Q. When you observed these men sitting there on the street, did they arouse your suspicions in any manner?

A. Yes, sir. They were parked there at that hour of the morning was suspicious, yes, sir, and we received a call on the complaint.

Q. And for what reasons were your suspicions aroused?
[fol. 36] A. Well, we—we received a call on the men and the call was that there were three men in an automobile parked at the northeast corner and they had been there since 10 p.m.

Q. And what time was it when you made the arrest?

A. And the arrest was—just a minute, sir—around 3 something in the morning.

Q. Around 3 o'clock in the morning?

A. Yes, sir, 3:05 a.m.

Q. Were you present when these men were questioned as to what they were doing in that vicinity?

A. Yes, sir.

Q. Did they give any logical excuse for being in that area at that time of the morning?

A. Yes, sir. They said they were waiting for a truck to come through; they were out of a job and they said they were waiting for a truck and we asked them the identity of the truck, which they couldn't give us the identity of the truck and we asked them who the man was they were supposed to meet and they couldn't—they just said they [fol. 37] was supposed to meet a man coming through there on a semi-truck, was supposed to meet them down at the restaurant down at the next corner and they didn't have no money on them—I think a quarter is all one of them had or something like that.

Q. Did they have any papers to show that any one of them owned the automobile?

A. No, sir.

Questions by the Court:

Q. Did they have driver's licenses?

A. Yes, sir.

Q. All three of them?

A. As I recall, Mr. Sykes had driver's license.

Q. Did he have title papers to the car?

A. No, sir.

Q. He did not have?

A. No, sir.

Q. Did you ask to see them?

A. Yes, sir.

Q. Did he give any explanation?

A. No. He says—he says he just bought the car, he had [fol. 38] purchased the car.

The Court: Go ahead. What kind of car was it?

A. It was a 1955 Buick, sir.

The Court: Go ahead.

Questions continued by Mr. Meade:

Q. Mr. Dotson, after you took the men out of the automobile to the police station, did you book them on any charge?

A. Yes, sir. We booked them on the vagrancy charge, sir, then afterwards the car was searched, we booked them with vagrancy and carrying concealed and deadly weapons.

Q. Tell us why the automobile was searched.

A. I didn't hear.

Q. Tell us why the automobile was searched.

A. The automobile was searched, sir, for one reason, that Mr. Sykes asked if he could go down and get his cigarettes out of the car and he was refused to do so and Mr.—Detective Ciafardini then said we would go down and we would look in the car, so we went down and looked in the car and Detective Colston was there and got in the glove compartment [fol. 39] and thought maybe the cigarettes might be in the glove compartment and when we looked in the glove compartment there was the loaded revolvers.

Q. And then after you found the loaded revolvers, you proceeded to search the rest of the automobile?

A. Yes, sir. That is true, sir.

Q. And you did the actual search yourself?

A. Yes, sir.

Q. Of the trunk?

A. Yes, sir. These articles, sir, were in the trunk. These articles were in a pillow case.

Q. And the pillow case was in the trunk?

A. Yes, sir. That is true, sir.

Redirect examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Officer Dotson, was the glove compartment locked? [fol. 40] A. No, sir. The glove compartment was not.

Q. Then all that was necessary to do was push the button and it opened?

A. Yes, sir. That is true.

Recross-examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney.

Q. Did you place a concealed weapon charge against these men?

A. Yes, sir.

Q. Were these men tried on the vagrancy and concealed weapons charge?

A. They were brought before our court and I think it was continued, sir.

Q. Continued?

A. Yes, sir, they were arraigned in our court.

The Court: Did they give you the keys to go down and get the cigarettes?

The Witness: No, sir. The men had already been searched, Your Honor, when we booked them and the keys were there and Mr. Sykes said that these were the keys to the automobile and he said also that one of the keys [fol. 41] were the keys to the trunk, which we tried all of the keys and the keys wouldn't open the trunk. That is the reason we had to gain entrance through the back seat.

Mr. Leggett: Call William Burkhart.

WILLIAM BURKHART being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. Robert Leggett, Counsel for the Defendants.

Q: Your name is William Burkhart?

A. Yes, sir.

Q. You are the clerk of Newport Police Court?

A. Yes, sir.

Q. That is in Campbell County, Kentucky?

A. Yes, sir.

Q. You have brought with you the journal and docket of the Newport Police Court?

A. Yes, sir.

Q. I would like to direct your attention to the three defendants in this cause, John Richard Sykes, John Preston and Kenneth Strunk. I will direct your attention further to the last week in January, approximately January the 20th, and thereafter and I will ask you to state whether or not the records of Newport Police Court disclose that these men had a hearing in Newport Police Court.

A. Yes, sir. They were arrested on the 20th of January, Otis H. Strunk—pardon me—Kenneth Strunk, John Preston and John Sykes. They were charged with vagrancy, carrying a concealed and deadly weapon, all three on \$5,000 bond. That was on the 20th of January. It was continued until February the 3rd. At that time the police asked for a continuance, which isn't unusual in a vagrancy charge.

Q. Then the case was again called on February the 3rd, 1961?

A. And in the meantime they had been adopted by the U. S. Government.

Q. And what if any disposition was made of the two charges, vagrancy and carrying concealed weapons?

A. Well, my records show that they were adopted by [fol. 43] the government,—

Q. In other words—

A. (continuing)—which is not unusual.

Q. (continuing)—these charges were either placed on the open docket or what?

A. There was no—just adopted by the government.

Q. There has been no disposition whatsoever made of the charges other than the federal government took these prisoners, is that correct?

A. That's right.

Q. Now, do you have any other records with you pertaining to this case?

A. No. The only thing I have is the—page 91, "Comes the same defendants all charged with vagrancy and carrying a concealed and deadly weapon," case was continued until 2-3-61. That was the day they were in court the first time.

Q. That is the journal entry of Newport Police Court on that particular case?

A. January the 20th.

Q. Now, will you direct your attention to February the 3rd and recite to the Court what the journal entry states [fol. 44] on that date with respect to this case.

A. City vs. Kenneth Strunk, John Preston, John Sykes, the same defendants, all charged with vagrancy and carrying concealed and deadly weapons. All three were adopted by U. S. Government.

Mr. Leggett: I have no further question, if the Court please.

Mr. Meade: No questions.

The Court: You may stand aside, sir.

Are you through with him?

Mr. Leggett: We are. We are through, Your Honor. We would like to request that he be released as a witness.

The Court: You may be finally excused. I assume he will be available.

Mr. Leggett: If the Court please, that concludes the testimony which we wish to offer on this particular motion.

The Court: Do you have any evidence on this motion?

Mr. Meade: The government offers none.

[fol. 45] The Court: I will hear you on that, Mr. Leggett.

(Reporter's note: Argument in behalf of the motion to suppress was made by Mr. Leggett, counsel for the defendants.)

MOTION TO SUPPRESS OVERRULED AND EXCEPTION THERETO

The Court: The Court is of the opinion that the officers in making this search, acting under instructions from their superior, on the basis of the circumstances surrounding these defendants and their location at that time, 3 o'clock in the morning, in a downtown section, where business houses were located, near a night club, had been there some four or five hours on the street, with these three men loafing about it, without any apparent reason; then when questioned, gave illogical or rather vague and irresponsible and suspicious reasons for why they were there present, and the officers received a call alerting them to these sus-

picious circumstances—I think they were justified in making an arrest for vagrancy and they searched the car as a result of the arrest.

Let the motion be overruled.

Mr. Leggett: I would like to note my exception, if the Court please.

The Court: Yes, you are given an exception.

It was not an unreasonable search. It was a search made [fol. 46] pursuant to an arrest and they were justified in making the arrest. The Court takes cognizance of the fact without making it a part of the record, but these officers were alerted because of surrounding suspicious circumstances there in Newport, Kentucky, near this night club, in a location where persons, three or four men in a car and they do not have the title papers to it—all that in my opinion justifies the arrest for vagrancy and the search was made as a result of the arrest. I think it was not an unreasonable search, but a reasonable search in light of all the circumstances and the evidence that they found on the search would be competent.

Let the jury come back in, Mr. Marshal.

(Thereupon the proceedings out of the presence of the jury were concluded.)

(Reporter's note: The jury returned into the courtroom and resumed its place in the jury box.)

The Court: Read your indictment, Mr. District Attorney.

Mr. Meade: May it please the Court.

The Court: Mr. Meade.

Mr. Meade: As the Court has previously informed you, [fols. 47-48] this is a conspiracy indictment against four different individuals. A person by the name of Chester Clark is still a fugitive and, of course, no evidence will be considered against him since he is absent here today.

[fol. 49] OPENING STATEMENT FOR PLAINTIFF

Mr. Meade: The government's evidence in this case will be that on the morning of January the 20th, of this year, that the Newport Police received complaints over the tele-

[fol. 50] phone that three suspicious looking people were parked in an automobile in Newport, Kentucky, that they had been parked there in this automobile for approximately five hours. Four police officers went out to investigate and when they arrived they found in this automobile the three defendants who are sitting over at counsel table to my left, John Richard Sykes, John Brenton Preston and Kenneth Ray Strunk.

Upon questioning these three individuals as to their presence in that area at 3 o'clock in the morning, they were not able to come up with any type of an excuse as to why they should be there. There was some statement about waiting on a truckdriver who would be passing through, but they were not able to say what trucking company it was, the name of the person, what time he would be coming through, or anything else. These men did not have title papers to show ownership of that automobile, they didn't have any funds and some of the men upon being questioned, stated that they had not worked in over six months. The officers arrested these men, took them to the police station, impounded their car and booked them upon the charge of vagrancy.

After they had been booked for vagrancy, the defendant Sykes requested permission to go to his automobile for [fol. 51] some cigarettes. Of course, the officers could not permit a defendant who had been arrested to go to his automobile because that might be dangerous, so they proceeded to go out to the automobile, themselves, to look for the cigarettes. They looked in the seats, they looked on the dash, no cigarettes. So then they opened the door to the glove compartment and they found two loaded revolvers. They then booked these three men for concealing a deadly weapon and proceeded to search the rest of the automobile. In searching the automobile, they found in the luggage compartment in a pillow case, the items that I have—that I have previously mentioned, a falsely made Kentucky license tag—more about that in a moment. The two pistols were already found in the glove compartment. They found a stocking mask. Now, I don't know whether any of you as children growing up or not, used to get your mother's silk hose and put it over your face and make a sort of disguise. This stocking mask had slits cut for the eyes, a place for the nose

and a place for the mouth and was knotted at the other end, so it would just slip down over the face and if any of you ever tried to put on one of these stocking mask disguises, you know it can change your features considerably. They found four caps of different varieties, different [fol. 52] colors, and two of these caps had been slit on the sides so they could be pulled further down upon the head. They had two pillow cases, they had certain types of ammunition in the automobile. They had two pair of gloves and had various sizes and lengths of cord and rope.

Our evidence will be that these men were questioned about the stuff that was found in the automobile, and that the defendant Richard Sykes stated that they had secured this different material for the purpose of robbing the bank at Berry, Kentucky.

Our evidence will be that on one or two occasions prior to the date that they were arrested, they went to Berry, Kentucky, for the purpose of actually robbing the bank. On one occasion when they went there, they saw about three Kentucky State Police cars which scared them, and they decided against it on that particular date and decided to wait for another time.

Our evidence will further be that upon questioning of these three defendants that they gave a detailed, or at least one of them did, plan for robbing this bank. They had actually set up a get-away route, which would take them off of the main highways and put them on the back roads. Their get-away route as set up in our evidence will show that [fol. 53] they would start here at Newport, Kentucky, travel down Highway 27 to Pendleton County, into Harrison County; that then when you get to Harrison County, there is a turn-off on the old 27, which would take you into the little community of Berry, Kentucky. Their plan was to rob this bank in Berry, come back out—by the way, their plan in going in was to go down 27 and as you are traveling south on Highway 27 there are two roads leading off of Highway 27 into Berry, Kentucky. Their plan was to go down Highway 27 and turn off on the second intersection, go into Berry, Kentucky. Then after the bank was robbed, to leave Berry, come back out, and take the other highway back out, the old Highway 27, get back on Highway 27 go down Highway 27, approximately one mile, and get

on Kentucky State Highway 1284, they would go to Kentucky Highway 19, 19 to Kentucky 10, to Berlin, Kentucky, Berlin to Highway 1011, up to the Ohio River and then travel on Kentucky Highway 8 to New Richmond, Kentucky, and at New Richmond catch the ferry across the river, go across, come down Highway 52 in Ohio to Cincinnati, cross the bridge at Cincinnati, back into Kentucky that was, and our evidence will show that to be their get-away route once the bank had been robbed.

Our evidence will be further that one of the defendants [fol. 54] ants could recite the highway numbers on these roads without having a road map at his disposal, that he had actually memorized the get-away route:

Now, on these four caps, our evidence will further show that one of the defendants went into a little store, dry goods store, located in Berlin, Kentucky, which is actually on the escape route. Our evidence will be that he went in to purchase, ask the man for a certain type of cap, and was shown the caps and decided to take an extra one. We will have a witness to testify that one of the defendants bought that cap there at the store in Berlin, Kentucky.

Our evidence will further be that there was a Kentucky license plate found in the rear of the automobile and that this Kentucky license plate was actually made at La Grange and in the license-making portion of the prison there. The license plate had been made by the defendant Chester Clark, who is not on trial here today, and as I said, is a fugitive, that this license plate was manufactured by Clark, while he was a prisoner at La Grange and upon his release in November of 1960, smuggled the license plate out. In fact, he smuggled two license plates out, one for the year 1960 and one for the year 1961. This license plate—I can't remember the number at the present time, but it was supposedly [fol. 55] posedly made for Mason County, Kentucky. Our evidence will be that both the license plate for the year 1960 and the year 1961, both were for Mason County and both were the same serial number.

Our evidence will be that when questioned concerning this license plate, the defendant Chester Clark stated that the last he saw of it was when he took it out and buried it in some plastic down under the ground, plastic such as your dry cleaning might be packaged in, and he doesn't

know what happened to it and he doesn't know who could have found it, but that one of the defendants might have followed him some time and that is all he professes to know about the case.

Our evidence will further be that these four individuals were seen numerous times in the Depot Cafe, which I believe is here in Covington, Kentucky. Our evidence will be that the Depot Cafe is not a type of place that you ladies and gentlemen of the jury would frequent. Our evidence will further be that several people, some employed in the Depot Cafe, heard these witnesses discussing pulling a big job down in Berry, Kentucky, heard these witnesses discuss the fact that they went down to pull a big job in Berry, Kentucky, and were frightened by about three Kentucky State Police cars that they saw at [fol. 56] the intersection of Kentucky Highway 27 and the road leading off to Berry, Kentucky.

Our evidence will further be that the defendant John Richard Sykes purchased one of the weapons found in the automobile, from the Elmer Joyce Gun Shop in Covington, Kentucky. Our evidence will further be that the defendants by deceit attempted to procure an automobile to be used as a get-away car, that they went to the Stricklen Auto Sales, in Newport, Kentucky, and that one of the defendants who has an artificial leg, told the proprietor of the used car lot that he wanted to secure this automobile to go to Lexington, Kentucky, and see his attorney, that he had a case pending against the C. & O. Railroad, and that if he could go to Lexington and talk to his attorney that he would be able to secure a settlement and purchase the automobile. One of the defendants had previously secured automobiles from this same used car lot, with the pretext of taking them out in certain areas of Kentucky and attempting to sell them, although our evidence will be that none were ever sold by this defendant; that since he had known this one defendant who had previously taken automobiles out for the purpose of trying to sell them, he let them have the automobile on this date, and this, our evidence will be, was the same date that they [fol. 57] went to Berry, Kentucky, for the express purpose of robbing the bank and were scared away when they saw the police cars. This automobile was later purchased by

the defendant John Richard Sykes in his wife's name. There is one additional factor about the license plate. Our evidence will show that one of the defendants manufactured from a coat hanger, little hooks so that a person could take the license and immediately hang it over another license plate and when he didn't want the license plate there any more, it could be immediately removed without any trouble whatsoever. Our evidence will be that the Bank of Berry, Kentucky, is the major business establishment in that town, that the Bank of Berry is the only establishment that could be considered a big job, that during the period around January the 19th, the Bank of Berry has larger amounts of deposits on hand due to the tobacco selling season.

Our evidence will further be that at least two or three of these individuals were seen there in the town of Berry, Kentucky, about one week prior to the date on which they were arrested, that they were seen in a little restaurant which was in sight of the bank.

Ladies and gentlemen, we will present numerous witnesses to you here today. Some of our testimony you may not understand at the time we present it. It will be [fol. 58] something like a jigsaw puzzle. We have to take this jigsaw puzzle and put it together each piece at the time so that when we fit each piece into its respective position, we will come up with the complete picture and when we fit all of our pieces of our jigsaw puzzle together, by virtue of the testimony of the different witnesses, we will present to you, I think that you will probably at that time be able to decide that a conspiracy had been formed for the express purpose of robbing the Bank of Berry, Kentucky.

The Court: Do you care to make a statement at this time, Mr. Leggett?

Mr. Leggett: We will defer our statement at this time.

The Court: Call your witness.

EVIDENCE FOR THE PLAINTIFF

JOSEPH QUITTER being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Your name is Joseph Quitter?

A. Yes, sir.

[fol. 59] Q. Mr. Quitter, what do you do, sir?

A. Detective for the City of Newport, Kentucky.

Q. How long have you been a detective for the City of Newport?

A. Approximately two, two and a half years.

Q. How long have you been a policeman for the Newport, Kentucky, Police Department?

A. About 18 years.

Q. I will ask you to look at the three defendants who sit on my right at the table with their counsel and tell me if you have seen these three individuals before.

A. Yes, sir, I have.

Q. When was it—what date did you first see these three individuals?

A. On the 20th of January, this year.

Mr. Leggett: If the Court please, I would like permission to approach the bench.

The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in [fol. 60] the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Leggett: If it please the Court, this is a charge of conspiracy. As I understand the law, the essential elements of this crime are an unholy agreement to accomplish a crime or violation of law against the United States. It is my understanding that the order of proof is to show the agreement on the part of the parties and then the overt acts, which were performed by these parties pursuant to that agreement.

Now, it is apparent from the witness on the stand and the date which has been mentioned that the first time he has seen them, that we are now proceeding to the overt acts rather than go to the agreement of the parties or the essential elements of the conspiracy.

I think I would like to interpose an objection at this time to the changing of this order of proof. I think that we are entitled to have the proof in the proper order unless a specific motion is granted by the Court.

The Court: Well, the matter of proving a conspiracy may be made up of the overt acts. It is impossible to say just when the jury may decide, the Court may decide there is no conspiracy. All they can do is prove the [fol. 61] various acts of the defendants, which are or part of which may be the overt acts charged in the indictment, part of which may be other acts. There is no way to prove the conspiracy itself except by proving what they did.

Overruled.

Mr. Leggett: Note my exception, if the Court please.
Thereupon the Colloquy at the Bench ended)

Q. I believe my last question to you, Detective Quitter, was whether or not you knew these individuals and did you give me an answer to that?

A. Yes, sir.

Q. I believe I also asked you the first time on which you saw them.

A. Yes, sir.

Q. Did you give me an answer to that?

A. Yes, sir, I did.

Q. What was that, sir?

A. On the 20th of January, this year.

Q. Would you tell us what the occasion was on which you first saw them?

[fol. 62] A. We received a call, Detective Ciafardini and myself, from headquarters, to investigate with two uniformed men three occupants of a car in the vicinity of 10th and Monmouth.

Q. Tenth and Monmouth in Newport, Kentucky?

A. Yes, sir.

Q. Did you investigate this automobile and these people?

A. Yes, sir.

Q. Tell us what transpired after that.

A. The three men seated over there (indicating) were in the car and we asked them what they were doing here, they were very vague as to why they were there and eventually one of them stated this, that they were waiting for a man who was driving a truck by the name of Johnny Sexton. We asked him who this Johnny Sexton worked for and they didn't know that; what kind of truck he drove, they didn't know that; and we asked them about the ownership of the car. Sykes said he owned the car. When we asked him when he had bought it, he said the day before and we said, "Well, how would Johnny Sexton know you, he doesn't know the car?" And he stated, "Well, [fol. 63] he usually goes down at the next corner and stops in for a cup of coffee." So we said, "Well, why didn't you park down there?" Well, he couldn't give any explanation of that. We asked him about working. Neither one had a job. One of them I think stated that he hadn't worked for about six months. So we placed a charge of vagrancy on them.

Q. Did you take them to the police station at that time?

A. Yes, sir, we did.

Q. Did you also take an automobile?

A. Yes, sir.

Q. What happened after you reached the police station? Did you place a charge against them of vagrancy?

A. We placed a charge of vagrancy against them at police headquarters and then we started to interrogate them.

Q. Do you know how much money they had on their possession at the time they were searched?

A. Yes, sir.

Q. How much?

A. A quarter between them.

Q. Did you find any other items other than money on [fol. 64] their person when they were searched?

A. Yes, sir. I think, if I remember correctly, and I believe there was a wallet or two. I don't recall what was in them, but definitely no money, just that quarter.

Q. What happened after these men were taken to the jail and booked on the charge of vagrancy?

A. We started interrogating them separately and Sykes

asked the officer in charge about going back to his car for a pack of cigarettes and the officer in charge refused him.

Q. Why did he refuse? Was that the normal procedure?

A. Well, it would be normal procedure.

Q. Go ahead.

A. A little while later, Detective Ciafardini and one of the officers went down to search the car. They found no cigarettes, but they brought back with them two guns.

Q. Did you place an additional charge against them after you found those two guns?

A. Yes, sir, we did.

[fol. 65] Q. What charge did you place against them?

A. Of carrying concealed weapons.

Q. Did you do anything further after you found those two guns?

A. Well, then a little bit later in searching the car farther, there was a sack found in the back end, a pillow slip, with another pillow slip inside, and there were several lengths of heavy cord, plus two shot-gun shells, two stocking masks, one with holes cut in it for the eyes and the mouth and two pairs of gloves and about four types of caps.

M.: Leggett: If the Court please, I would like the record to show my continuing objection previously-raised.

The Court: All right. Overruled.

Q. Can you point out to the Court and jury the defendant Strunk?

A. Strunk is the man with glasses on, that would be the third person starting from the left (indicating).

Q. The one sitting next to his counsel?

A. Yes, sir. Yes, sir.

[fol. 66] Q. And the defendant Preston?

A. Preston is on his right.

Q. And the defendant Sykes?

A. Sykes is on Preston's right.

Q. Was all of those items which you mentioned found in the luggage compartment of the automobile?

A. Yes, sir.

Q. Did you find anything else that you haven't mentioned here, either in the automobile or on the person of each of the defendants?

A. Well, there was also a Kentucky license plate in the pillow slip with pieces of like coat hanger up at the top wound through the hole and then forming a hook that a plate could be hooked on to something or on to another plate.

Q. Who was the person or police officer who actually searched the persons of the defendants?

A. Well, I don't actually recall any specific man searching the persons. There possibly could have been one or the other at different times.

Q. Does one of the men have an artificial leg?

A. Yes, sir. Preston does.

[fol. 67] Q. Which one?

A. Preston.

Q. Do you know whether or not some one searched this artificial leg?

A. Yes, sir. It was searched.

Q. Do you know whether anything was found in it?

A. There were two or three band-aids in the hollow part of the leg down below, and a safety razor.

Mr. Meade: You may cross-examine.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Now, Detective Quitter, I believe you stated that you first saw these defendants on the 20th day of January in the morning?

A. Yes, sir.

Q. And that was at the intersection of 10th and Monmouth?

A. It was just a little north of the intersection.

Q. It is near the Tropicana?

A. Yes.

[fol. 68] Q. Was the Tropicana open at that time?

A. I never checked specifically.

Q. How was the traffic flow on the street at that time of day?

A. There wasn't too much traffic.

Q. Was there any pedestrians around there to amount to anything?

A. Not that I noticed.

Q. These men were seated in the car at the time that you arrived?

A. Yes, sir.

Q. And were they—did they look suspicious to you?

A. Well, I would say with the call that we received, yes.

Q. With the call that you received, they looked suspicious?

A. In conjunction with that.

Q. You received a call from Lieutenant Bishop at the desk?

A. Yes, sir.

Q. Now, at the time that you saw that, at the time that you stopped there, you asked these men to get out of the [fol. 69] car and questioned them, is that correct?

A. Yes.

Q. And then you went to the Newport Police Station with them?

A. Yes, sir.

Q. Now, I believe you testified that the Detective in charge and one police officer went out and made a search of the automobile?

A. Well, I didn't say the Detective in charge.

Q. One of the uniformed men went out?

A. One of the Detectives and one of the uniformed men.

Q. And when they returned they had two hand weapons?

A. Yes, sir.

Q. You don't know where those hand weapons came from except what they told you, is that correct?

A. No, sir, I don't.

Q. You further testified that this bag of merchandise was brought in by one of the uniformed men?

[fol. 70] A. Yes, sir.

Q. And you don't know where that was found other than what they have told you, is that correct?

A. That's correct.

Q. Now, you stated I believe, Detective Quitter, that these men were interrogated separately?

A. Yes, sir.

Q. And this search was made at some time during the interrogation of the defendant Sykes, is that correct?

A. Yes, sir.

Q. Did you at any time see anyone use any force with respect to the defendant Sykes?

A. I did not. No, sir.

Q. No force was ever used upon him in your presence, is that correct?

A. That's correct.

Q. Is it possible that force could have been used upon the defendant Sykes without your having been present there in the police station?

A. It is possible.

[fol. 71] Q. You were not present at all times after he was brought in?

A. Not present in that specific room, that's correct.

Q. You were in other rooms down in detective headquarters, different places, is that correct?

A. Yes, sir.

Mr. Leggett: I have no further questions.

The Court: Stand aside.

Mr. Meade: One more question.

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Did I ask you what time it was when these men were arrested?

A. No, sir, you didn't.

Q. What time was it?

A. Approximately 3 o'clock in the morning.

Q. Three o'clock in the morning?

A. Yes, sir.

Mr. Meade: That is all.

[fol. 72] The Court: You may stand aside. Are you through with this witness?

Mr. Meade: Yes, Your Honor.

The Court: He may want to be excused.

The Witness: I would like to.

The Court: He may be finally excused.

PAT CIAFARDINI, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. State your name to the jury please.

A. Pat Ciafardini.

Q. What do you do, Mr. Ciafardini?

A. Detective in the City of Newport.

Q. How long have you been detective?

A. Fourteen years, approximately.

[fol. 73] Q. How long have you been with the department?

A. About 16 years.

Q. Are you what is known as a plain clothes detective?

A. Yes, sir.

Q. Do you know the three defendants who are sitting at the counsel table to my right?

A. Yes, sir.

Q. Do you know which one of those defendants is the one called Sykes?

A. Yes, sir. The one in the blue suit and white shirt and blue tie.

Q. And Preston?

A. The one with the T-shirt.

Q. And the defendant Strunk is the one——

A. Yes, sir.

Q. (continuing) —sitting next to his counsel?

A. The one with the short jacket.

Q. How long have you known these two individuals?

A. Since the 20th of January.

[fol. 74] Q. And what was the nature of the occasion when you became acquainted with them?

A. We were dispatched to 10th and Monmouth, from the office, by the Lieutenant. He had received a call that there were three suspicious men acting suspiciously up at 10th and Monmouth, in a pale green Buick, coach.

Q. Did you proceed to that location?

A. Yes, sir.

Q. And who else was with you?

A. Detective Joseph Quitter.

Q. Did any other officers arrive either before or after you were there?

A. Before. Officer Colston and Officer Dotson.

Q. What did you find when you arrived at the scene?

A. Strunk and Preston, the officers already had them two out of the car when we pulled up alongside and Sykes was still sitting in the car and I jumped out of the cruiser. Officer Quitter was driving and I ordered him out right away.

Q. Did you question these three individuals as to their [fol. 75] reason for being in that area?

A. Yes, sir. I took Sykes and brought him around the car and put him on the sidewalk to get him off the street and I asked him what was the nature—well, the other officers were talking to the other two. He said, "I am supposed to meet a man named Sexton coming from Lexington. He is supposed to be driving a truck." I said, "What kind of a truck?" "Well," he said, "I don't know what kind of a truck." I said, "Well, how do you know you are going to meet him?" He says, "Well, if I don't I will meet him down at 9th and Monmouth at the restaurant." There are two restaurants there, the Minute Chef and the Crystal Chili Parlor. So I said, "You are just going to go down there and you are going to know who he is." And I said, "You don't even know what kind of a truck he is coming in."

Q. What time was this?

A. This was about 3 o'clock in the morning, on the 20th.

Q. Did you find out who was driving the automobile?

A. Yes, sir.

Q. Who was driving?

A. John Sykes.

Q. Did you ask him if he had title papers for that auto-
[fol. 76] mobile?

A. Yes, sir.

Q. Did he have them?

A. No, sir.

Q. Did he have any money on his person?

A. Had 25¢ between the three of them.

Q. After you talked to the men there, what did you do?

A. He said—I asked him if he had been working and he said no and the others were asked if they had been working and they said no. And we also asked if any of them had been arrested and Sykes spoke up and said, "Yes, I was arrested one time for BE, which is breaking and entering, a storeroom or storehouse.

Q. What did you do after you finished your discussion with these men?

A. We placed them under arrest and charged them with a vagrancy charge.

Q. Did you take them to the police station at that time?

A. Yes, sir. We took them to the police station.

[fol. 77] Q. Did you take the automobile to the police station?

A. They all went together, yes, sir.

Q. Did you search their persons at the police station or at the scene where their automobile was first found?

A. Well, we frisked them at first not taking anything personal, just to see if they had any guns or knives in there and then we took them to headquarters.

Q. Then you searched them again after you got to police station?

A. For their personal effects; they bring it in before the sergeant and lay everything up on the desk.

Q. What did you find on their persons after you got them to the police station?

A. Well, on Preston they was a piece of binding twine that he had in his pocket.

Q. Do you know about how long?

A. Yes, sir. I would say that piece was about—well, approximately—maybe four or four and a half to five feet.

[fol. 78] Q. Where was that found, on his person?

A. Officer Quitter found it on him.

Q. Whereabouts?

A. In his hip pocket.

Q. Hip pocket?

A. Yes, sir.

Q. Was anything found on any of the other defendants?

A. Well, they had their wallets and personal effects and things like that and the keys was brought in and laid on the front of the desk in front of Sykes.

Q. Did you find anything else on Preston other than the cord?

A. Yes, sir.

Q. What else did you find?

A. Well, we had found out that he had an artificial limb and we asked him to remove it and as he removed it, shook it out, there was two band-aids fell out and a razor.

Q. What type of a razor?

A. One of them safety razors that you screw at the [fol. 79] bottom and they open up.

Q. Did it have a blade in it?

A. I just don't recall that because I didn't pick the razor up. One of the other men picked that up.

Q. After searching these men and after you booked them on the charge of vagrancy, will you tell us what happened then?

A. Yes, sir. Mr. Sykes asked if he could go down to his automobile and get his cigarettes. Of course, he was denied. And after we had taken them in and placed them back in jail, I got the keys from the Lieutenant and went down and I looked on the seat and no cigarettes. I looked up on the dash, no cigarettes, and I opened up the glove compartment and there was two loaded revolvers there in the glove compartment.

Mr. Leggett: If the Court please, I would like the record to show my objection to this evidence.

The Court: Overruled.

Mr. Leggett: Exception.

Q. What type of revolvers were these that you found?

A. One was a .38, snub-nose, and the other was a .38 — [fol. 80] nickel-plated .38.

Q. Now, after you found these two revolvers, what did you do?

A. Well, I had Officer Dotson and Colston with me and I just said, "Ouch"—you know, in our frame of talk—so I went, got the guns and we brought them up, back up to headquarters, and I said—asked the Lieutenant to have Sykes brought out and as he came out I said, "You wanted cigarettes. You wanted to get something out where you could blow somebody's head off," and I pushed him in a chair and I

sat down and said, "We have got some talking to do." And then in the meantime I asked Dotson to go back down and see if he can get in that trunk again because we had tried it and the keys wouldn't fit. So they tore out the back seat where they got into the trunk through the back seat. So as I was talking to Sykes, this was going on, the officers were down there going in the back way to the trunk, and they came back up with a pillow case and showed the Lieutenant and the Lieutenant called me out and showed it to me.

Q. Did you examine the contents of the pillow case then?

A. Yes, sir.

Q. And what all did you find inside that pillow case? [fol. 81] A. Well, we found the stocking mask, ladies' stockings which were cut and tied with a knot at the top where you could slip over your face to disfigure your face—there is a pressure on it—and four caps. I believe one was a blue baseball cap. One was a khaki cap and one was a black and white corduroy cap. I believe it was split if I remember correctly. And a fishing cap. And also was—

Q. (interposing) Before you continue, what—where is this stuff that you found at the present time? Do you know?

A. It was turned over to the agents.

Q. The FBI agents?

A. Yes, sir.

Q. And did you turn it over to them in a sack?

A. Yes, sir.

Q. The pillow case, that is.

A. Yes, sir.

Q. Where did you turn it over to the agents?

A. It was turned over the next day.

[fol. 92] Q. Do you have any type of a record to show the list of the stuff found in the pillow slip?

A. Yes, sir. We have a master report on it, but I don't have it with me.

Q. Did you mark either of the two guns which you found in the dash of the automobile?

A. The serial numbers, yes, sir. That is put in the master report.

Q. I will have the marshal hand you what looks to be like a pillow slip, along with the tag that was attached to

the pillow slip, and ask you to tell the jury whether or not you have seen that before.

A. Yes, sir.

Q. And where did you see it before?

A. At police headquarters when Officer Detson brought it up from Sykes' automobile.

Q. Is that the same one that was found in Sykes' automobile?

A. Yes, sir. There should be another pillow case. I believe there were two. There should be one in here.

Q. Would you lift out one of the items contained?
[fol. 83] A. (Removes cap)

Q. Is that one of the caps found in there?

A. Yes, sir.

Q. Is that cap an ordinary cap that you and I would wear every day?

A. No, sir.

Q. Why is it not?

A. Because it is used for hunting and winter sports, things like that. Black and white cap.

Q. And looking to the rear of the cap it looks like it is torn or something. Would you tell us what is wrong with the cap, if you know?

A. I would say it was cut, so it could fit on a head. It wasn't quite big enough.

Q. Would the cap fit you?

A. I wouldn't know unless I tried it.

Q. Would you try it?

A. (Putting cap on)

Q. Would you take out one of these other items found in the sack.

[fol. 84] A. (Removing another cap from pillow case) That is the blue baseball cap I mentioned, before.

Q. All right. Would you take out one of the other caps?

A. (Removing another cap from pillow case) That is what I call the khaki cap.

Q. Is that a normal cap, as far as being able to wear it—in other words, no defects in any way?

A. I didn't quite hear you on that.

Q. Is there any defects on that cap? Is it torn like the first cap?

A. No, sir.

Q. Do you have another cap in the sack?

A. Yes, sir. That is the fishing cap, I call it.

Q. Is that cap torn?

A. Yes, sir.

Q. Can you wear that one?

A. (Putting cap on)

Q. All right. What else do you have in the sack?

[fol. 85] A. These gloves (indicating).

Q. Pair of leather gloves, appear to be?

A. Yes.

Q. And that is tan pigskin, is that?

A. Yes, sir. That is what I call it.

Q. And what else do you have?

A. These white and blue gloves.

Q. Just normal pair of work gloves?

A. Yes, sir.

Q. Cloth?

A. Yes, sir.

Q. All right. What else?

A. License plate.

Q. That is Kentucky license plate No. 824-101?

A. Yes, '61.

Q. And for Mason County?

A. Yes, sir.

Q. What is that at the top of the license plate?

[fol. 86] A. Here? 1961.

Q. No. I am talking about—

A. Oh, this is where they put it on the rear of the car, hook it on to the fender.

Q. Is that fashioned in such a manner that it could be attached to another license plate?

Mr. Leggett: If the Court please, I will object. I believe it calls for an opinion clearly. I think the jury will have to determine that.

The Court: Sustain the objection.

Mr. Meade: All right.

Q. What else have you got in the sack?

A. Mask, stocking.

Q. Does that stocking have any slits in it anywhere?

A. Yes, sir. It also has the tape that we found in it.

Q. Would you put the stocking on your head?

A. Yes, sir. (Putting stocking over face)

Q. Put on the first cap that you had on.
[fol 87] A. (Putting cap on)

Q. All right, sir. Thank you. There is another stocking in the bag also?

A. Yes, sir.

Q. Does that have any slits in it?

A. No, sir.

Q. Now, in looking back at the other stocking, did that have a band-aid on it?

A. Yes, sir.

Q. And where is the band-aid located?

A. Across here (indicating).

Q. Across the nose?

A. Uh-huh.

Q. Did that have slits for the eyes, nose and mouth?

A. Yes, sir.

Q. What else do you have in your pillow case?

A. Band-aids.

Q. How many?

A. There are four here. There should be more—five of them.

[fol 88] Q. All right. What else?

A. The razor.

Q. Is that the same razor that was taken from the artificial leg of Preston?

A. That plus two of the band-aids that fell out.

Q. Two of the band-aids were in the artificial leg also?

A. Yes, sir.

Q. All right.

A. Two shotgun shells (taking shells out).

Q. And what gauge are those?

A. Twelve.

Q. Twelve gauge. What else?

A. Here is the other pillow case (taking it out).

Q. Is that all that is contained in the pillow case?

A. Yes, sir.

Q. Are those the items that were brought to you by—

A. Officer Dotson.

Q. (continuing)—by Officer Dotson?

[fol 89] A. Yes, sir.

Q. Are they in the same condition as they were at the time Officer Dotson brought them to you?

A. Yes, sir.

Q. Is there any change in any of them?

A. No, sir.

Q. You say you made a note of the serial numbers on the two weapons?

A. Yes, sir.

Q. In the police report?

A. Yes, sir.

Q. I will have the marshal hand you a sheet of paper with some writing on it.

(Reporter's note: The document was shown to counsel for the defendant and then given to the witness.)

Q. Will you tell us what that is that the marshal handed you?

A. That is a copy of the master report that we keep on our police files.

Q. And what is that written in reference to?

[fol 90] A. That is in reference to January the 20th.

Q. The day that you arrested the three defendants?

A. Yes, sir.

Q. Does that give a list of the items found in their possession?

A. Yes, sir.

Q. Does it also show the pistols found in their possession?

A. Yes, sir.

Q. Does it give the serial numbers?

A. Yes, sir.

Q. I will have the marshal hand you—would you tell us what that is?

A. That is a .38 revolver, six-shot.

Q. Does that resemble the one which you found in the dashboard of the defendant Sykes' automobile?

A. That is the one.

Q. Does it have a serial number on it?

[fol 91] A. Yes, sir.

Q. Does that same serial number compare with the one shown in your police report?

A. The one on the stock. Here is the one that the police report put.

Q. That is not really the serial number on the stock?

A. No, but I have the serial number here in my notes.

Q. All right.

A. (continuing) That was just there.

Q. I will have the marshal hand you another pistol and some shells. What type of a pistol is that?

A. Twenty-two—.32—correction.

Q. Is that the—does that resemble the same pistol which you took from the dashboard of the defendant Sykes' automobile?

A. It is the same pistol, yes, sir.

Q. Is the serial number on that pistol the same as the one shown in your police report?

A. Yes, sir.

[fol 92] Q. Will you look at the ammunition which the marshal just handed to you and tell us what type of ammunition that is?

A. This is a .38, which goes into the nickel-plated; this here one here. These two, these are the .32's that go into this revolver here.

Q. In other words, all of the ammunition that you have there will fit either one or other of the two pistols—one or the other pistol?

A. Yes, sir.

Q. You spoke of finding some rope or some cord?

A. Yes, sir.

Q. Is that in that pillow case?

A. Yes, sir.

Q. Do you know which piece of the cord was found in the artificial leg of the defendant Preston?

A. There wasn't any rope found in his artificial—

Q. In his hip pocket?

A. Yes, sir.

Q. Do you know which piece there was found in his hip pocket?

[fol 93] A. Yes, sir. (Taking piece of rope out of pillow case) This is it.

Q. Do you have some way of identifying it?

A. Yeah. Just where they tied that one knot where it is real rough.

Q. Would you hold that up so the jury can see it?

A. (Standing and holding piece of rope up)

Q. Now, the other cord and rope, where was it found?

A. In the automobile.

Q. In the pillow case?

A. Yes, sir.

Q. Hold up the larger piece by itself. Approximately how many feet would you say were there as a guess?

A. Oh, I would say 15—this here?

Q. Yes.

A. I would say maybe 15 feet.

Q. And all of this cord which you have there was found within the pillow case?

[fol 94] A. Yes, sir.

Q. Is there anything else in the pillow case?

A. Yes, sir. There is a stocking that was with it. Now, this other stuff I don't know (removing other articles)—this other stuff in here I don't know anything about. This black box in there—

Q. Would you take the black box out and have the marshal bring it back to me.

A. (Giving the box to the marshal)

OFFERS IN EVIDENCE

Mr. Meade: Your Honor, I would like to have the pillow case and its contents introduced into evidence as the Government's Exhibit No. 1.

I would like to have the contents of the pillow cases shown to the jury.

The Court: All right.

Mr. Leggett: If the Court please, I would like to renew my objection at this time. I would further like to make objection based upon the fact that the officer has never testified to who obtained these things. The only thing the detective has testified is that these things were brought in to him at the time the defendants were in the police station. I don't think the foundation has been laid.

[fol. 95] The Court: Did you see them taken out of the car?

The Witness: Not actually see the officer take them out of the car. I was up in headquarters.

The Court: You don't know personally whether they came out of the car or not, except what was told you?

The Witness: Yes, sir. That's right.

The Court: I sustain the objection.

Q. In your official duties there at the police station, were these items turned over to you to make the report?

A. To I and the Lieutenant, yes, sir.

The Court: You are going to offer another witness to show where they came from?

Mr. Meade: Yes, Your Honor, I will.

The Court: Let them be introduced with that understanding.

They have been in your custody, is that right? And [fol. 96] you turned them over to the FBI agent?

The Witness: (Nodding affirmatively)

Mr. Leggett: Note my exception, if the Court please.

The Court: All right.

(Reporter's note: The pillow case and contents were marked Government Exhibit 1.)

Q. Did you find three more rounds of ammunition?

Mr. Leggett: I will object to the form of the question.

The Court: Objection sustained.

Just ask him what else he found there.

A. Oh, you mean in here? Oh, yes, sir.

Q. Did you find it just now or did someone else find it?

A. No. I took them out of the—these are the rounds that was taken out of the gun, out of the .38, five and four. It carries a six-load but they only had five in the .38.

Q. Had we previously had those brought out of the pillow [fol. 97] slip or handed to you?

A. Yes, sir. He brought them.

Mr. Meade: All right. I would like to have those shown to the jury, the items found in the pillow case, Mr. Marshal.

The Court: Go ahead.

(Reporter's note: The items representing Government Exhibit 1 were passed to the jury.)

Mr. Meade: May it please Your Honor, I would like to have the .38 introduced as Government Exhibit No. 2, and the .32 weapon introduced as Government Exhibit No. 3 and the ammunition, as a whole, introduced as the Government Exhibit No. 4.

The Court: Are you going to offer the witness that says he took it out of the car?

Mr. Meade: This witness here testified that he took them out of the car.

The Witness: The guns, yes, sir.

Mr. Leggett: If the Court please, I would like the record to show my continuing objection to this.

The Court: Your objection to all of this evidence?

Mr. Leggett: Yes.

[fol. 98] The Court: Very well. Overruled.

Mr. Leggett: We except.

(Reporter's note: A .38 revolver was marked Government Exhibit 2; a .32 revolver was marked Government Exhibit 3; the ammunition for the two weapons was marked Government Exhibit No. 4.)

Q. Detective Ciafardini, after you found these two pistols in the automobile, did you place any additional charge against the defendants?

A. Yes, sir.

Q. What charge did you place against them?

A. Carrying concealed and deadly weapon.

Q. After you found the two pistols, did you say that you then requested one of the other officers to make a search of the automobile?

A. Yes, sir.

Q. What officer did you request to make the search?

A. Officer Dotson.

Q. Officer Dotson? And when he searched the automobile, this stuff that has been handed to the jury was given to you by Officer Dotson?

[fol. 99] A. Yes, sir.

Q. After you found this stuff did you attempt to talk to the defendants and question them in any regard concerning the items found in the automobile?

A. Yes, sir.

Q. Did you question the defendant Sykes?

A. Yes, sir.

Q. What did he tell you?

Mr. Leggett: If the Court please, may I have permission to approach the bench?

The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Leggett: If the Court please, I would like to object to this line of questioning upon the basis that the statement which was made by Mr. Sykes is in the nature of a confession and was made not in the presence of the other two defendants who are charged before this Court and there has been no independent evidence offered as to the existence of the conspiracy or as to the commission of the crime under the laws of the United States, or any plan to commit a crime under the laws of the United States. I feel that this statement [fol. 100] is inadmissible at this time for two reasons. There are no independent elements tending to show the commission of a crime, therefore the confession is not admitted in evidence. I think if it is admitted at any time that it is subject to a limited instruction that the jury is to consider it only as to the single man who made it. I have authority for that particular point if the Court would like it. I definitely feel that until there is independent evidence of the commission of a crime of conspiracy that this statement in the nature of a confession is not admissible.

The Court: I am inclined to agree with you.

You want to offer by this witness a confession made by one of these defendants? Now, any statement made by any of the defendants can only be considered as affecting the guilt or innocence of that defendant.

Mr. Meade: Yes.

The Court: Statements made during the life of the conspiracy and in furtherance of the conspiracy can be shown in connection with all of it, but this is a confession after the conspiracy was concluded and it is not in furtherance of the conspiracy.

[fol. 101] I am going to overrule—

Mr. Meade: Would the conspiracy have ended and did it end?

The Court: Yes.

Mr. Meade: If it is an arrest for the conspiracy then we can say that it—

The Court: A confession is not a statement made in furtherance of a conspiracy. There is no trouble about it. Any statement made by a member of the conspiracy in further-

ance of the objects of the conspiracy, during the life of the conspiracy and in furtherance of the conspiracy.

Mr. Meade: Does it have to be in furtherance as long as it is made during the life?

The Court: Made during the life and in furtherance of the objects of the conspiracy.

Mr. Meade: I had thought of the first part, made during the life of the conspiracy, but didn't know that there was an additional requirement that it had to be made in furtherance of the conspiracy.

The Court: Yes, in furtherance, in order to be competent as to the other defendants. I don't know what he is going to testify about, I don't know what your statement is, but I would have to sustain the objection to his testifying as far [fol. 102] as the other defendants are concerned. Whatever this defendant said can be used and admitted as affecting this defendant but this defendant only.

Mr. Leggett: If the Court please, I would like to request the Court's consideration of this point. Is there independent evidence as to the existence of a conspiracy at this point of the case? I don't think a confession or a statement in the nature of a confession is admissible until we have established by some other evidence, something other than the defendants' own admissions, that a crime was actually committed.

The Court: It doesn't have to be prior to that. A confession is competent only where you have established or do establish the corpus delicti.

Mr. Leggett: Now, has the corpus delicti of the conspiracy been established before this Court at this juncture?

The Court: It does not have to be at this juncture to be admissible, but it has to be before they close their case.

Mr. Leggett: In other words, it is more or less a conditional admission at this time?

The Court: That is right. If they do not establish a [fol. 103] corpus delicti, then the confession is not competent. If they don't prove the conspiracy, they are entitled to a judgment of acquittal. They can't put but one case on at a time. They can't prove the case by one witness.

Mr. Leggett: I understand. I don't have a specific case in point, but as I understand in any trial in a federal court, the corpus delicti must be established by some independent

evidence before the offer of a confession can be made and I think in that way the corpus delicti is not established by the confession itself and then filled in with a number of unrelated overt acts at a later time.

The Court: I will overrule the objection as far as the person making the statement is concerned, but I sustain it so far as the other defendants are concerned and so instruct the jury.

Mr. Leggett: Thank you, Your Honor.

(Thereupon the colloquy at the bench ended)

Q. Detective Ciafardini, you say you did question the defendant Sykes?

A. Yes, sir.

Q. Did you question the defendant Sykes by himself or [fol. 104] in the presence of the other two defendants?

A. We questioned them one by one.

Q. One by one?

A. Yes, sir.

Q. The other defendants were not present at the time you questioned the defendant Sykes?

A. No, sir.

Q. Did you ask the defendant Sykes about the items found in the automobile?

A. Yes, sir.

Q. What did he tell you?

A. He couldn't give an answer.

Q. He would not even answer. Did you question the defendant Preston regarding—

A. Yes.

Q. (continuing)—the items found in the automobile?

A. Yes, sir.

Q. Did he give you any information as to his purpose in having those items?

A. He stated he knew nothing about them.

[fol. 105] Q. Did you question the defendant Strunk?

A. Yes, sir.

Q. Did he give you any information as to why he had those items in his possession?

A. He stated he didn't know anything about it.

Q. Then each of the three defendants denied—

The Court: There is no use repeating it. He has already said that.

Mr. Meade: All right, Your Honor.

Q. Were the two pistols which you found in the dashboard of the automobile, on which side of the automobile or where in the automobile is the dashboard located?

A. To the front right.

Q. Front right. Could those pistols be reached by a man sitting in the front seat of the automobile?

A. Yes, sir.

Mr. Leggett: Objection. It calls for an opinion.

The Court: Overruled.

[fol. 106] Mr. Meade: You may cross-examine.

Cross-examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. Detective Ciafardini, going back to the beginning when you arrived at the scene at Tenth and Monmouth were these defendants in their automobile?

A. No. Two were already alighted from the car.

Q. That was in the presence of the other two police officers?

A. Yes.

Q. Who had requested that they get out of the automobile? Tell me, is it unusual for an automobile to be in Newport at 3 a.m. in the morning, in that vicinity?

A. No, sir.

Q. It is not. Did you investigate at that time if the Glenn Rendezvous or the Tropicana or whatever it is called, the night club, was in operation?

A. I hadn't been in that night. I wouldn't know.

Q. Well, you were in the vicinity?

A. Yes, sir.

Q. Did you observe—

[fol. 107] A. The marquee was lit.

Q. It was?

A. Yes, sir.

Q. Did you notice anyone coming out of this club or going in at that time?

A. No, sir.

Q. Were there any other persons in the vicinity?

A. No, sir.

Q. Any other automobiles parked there?

A. Yes, sir. There were automobiles parked.

Q. Going back to the pillow case, you don't know where that pillow case came from, do you?

A. First—the first I saw of it was when Officer Dotson brought it in.

Q. Just answer yes or no. Do you know where the pillow case came from?

A. Yes, sir.

Q. Where did it come from?

A. Out of Sykes' car.

Q. Did you see the pillow case taken out of the car?

[fol. 108] A. No, sir.

Q. Then you don't know where it came from, do you, of your own knowledge?

A. No, sir.

Q. Dotson brought the pillow case in?

A. That's right. That's correct.

Q. Now, tell me how did you identify this pillow case today?

A. By the label on it, Cannon, and the other—

Q. By the label?

A. Yes, sir, on there.

Q. Cannon is the manufacturer of pillow cases?

A. Yes, sir.

Q. Well, it is possible then that the other pillow cases are manufactured by Cannon, isn't it?

A. That's correct.

Q. Did you mark this pillow case in any way, yourself?

A. It was marked with the master record.

[fol. 109] Q. But there is no marking on it now?

A. It was marked with a tag with the master record and I believe that is the record there it was tagged with, right here, that card. The card with the record number on it. This here, you go to police headquarters and look up record 5876 and it is in the safe.

Q. Did you put that tag on there, yourself?

A. No, the Lieutenant—

Q. Did you see him put it on there?

A. No, sir.

Q. Then you couldn't positively state that was the pillow case which was brought to your attention at the police headquarters, can you?

A. It was the same.

Q. You don't know if it was the same or not, of your own knowledge, do you?

A. Only by the record.

Q. But you did not identify it, yourself?

A. I watched them—you asked me about the Lieutenant [fol. 110] —I saw the record number on the pillow. I saw them put it in the safe, but you asked me who put the record number on. I can't say. I didn't see the man write it.

Q. Did you question Sykes as to his occupation?

A. Yes, sir.

Q. What did he tell you?

A. He said he didn't have any, wasn't working.

Q. Did he ever tell you he had ever worked in his life?

A. Said he had worked.

Q. Did he say what he had done?

A. No. Didn't carry that—

Q. Did he tell you he was a furnace repairman?

A. No, sir.

Q. He didn't?

A. No, sir.

Q. Now, these gloves that you have identified, of course, you don't know where they were taken from either, do you? Is it possible they were taken from his top coat?

[fol. 111] A. I can't—I saw the gloves first when Officer Dotson brought them up.

Q. Tell me, did you make a statement to Sykes to this effect, "I am going to clean house with you"?

A. No, sir.

Q. You didn't mention that you were going to use him to clear up some of the past, unsolved robberies in Newport?

A. No, sir.

Q. Did you ever strike Sykes?

A. I pushed him.

Q. Pushed him?

A. Uh-huh.

Q. You never did lay a hand on him at any other time?

A. And that is when he wanted to go down and get the

cigarettes and we found the guns. I said, "You wanted cigarettes. Sit down." And I pushed him down.

Q. Do you know what disposition was made of this case in Newport Police Court?

A. The morning I was there it was continued.

[fol. 112] Q. Was it ever concluded? Was it ever called again?

A. Not to my knowledge.

Q. Going back to the automobile itself, did you ask Sykes when he acquired the automobile that night?

A. Yes, sir.

Q. What did he tell you?

A. He said he had gotten it yesterday, or the day before — I — it was one of them days.

Q. The previous day?

A. Yes, sir.

Q. Did you follow this up to see if, in fact, this was a true statement?

A. It was followed up through the Chief of Police and the rest. They took over as we went off duty.

Q. Was it a true statement that he purchased the car the day before?

A. I have heard, yes, sir.

Q. Well, can you state that it was a true fact?

A. No, I cannot.

Q. Now, these two guns that you have identified, did you [fol. 113] determine in whose name they were registered?

A. No.

Q. Did anyone in the Newport Police Department determine this to your knowledge?

A. No. I wouldn't know.

Q. In other words, you just assumed that they were his guns?

A. They were in his car.

Mr. Elfers: That is all.

[fol. 114] Mr. Meade: Officer Dotson.

GEORGE DOTSON, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Tell the jury your name.

A. Officer George Dotson.

Q. You are an officer for what police department?

A. Newport Police Department.

Q. How long have you been with the Newport—

A. Going on nine years, sir.

Q. Nine years?

A. Yes, sir.

Q. Do you know the three defendants who sit at the table to my right with their counsel?

A. Only the night we arrested them, sir. I haven't known them previous to that.

Q. You haven't known them previous to the night you arrested them?

A. No.

[fol. 115] Q. Were you with the other officers at the time these three men were arrested?

A. Yes, sir.

Q. Were you at the police station at the time these three men were booked?

A. Yes, sir.

Q. Did you assist in making the search of that automobile?

A. Yes, sir. I did, sir.

Q. Would you tell us about the search of the automobile?

A. Yes, sir. On the first search, sir, we—in the glove compartment we found two guns.

Q. You say "we"?

A. Yes, sir.

Q. Who else.

A. Officer Colston and Detective Pat Ciafardini and myself.

Q. The three of you were there at the time you searched the glove compartment?

A. Yes, sir.

Q. All right. Go ahead.

A. And in the glove compartment we found a .38 and a [fol. 116] .32.

Q. Pistol?

A. Yes, sir.

Q. Would you look at the Government Exhibit No. 2, which is the .38 pistol, and Government Exhibit No. 3, which is the .32 pistol, and tell us whether or not you recognize those two pistols as being the ones found in your search of the glove compartment of the defendant Sykes' automobile?

A. (Looking at the exhibits) Yes, sir, they are, sir.

Q. Did you prepare a report on the items found in your search?

A. Yes, sir. The Lieutenant in charge, sir; Pat Ciafardini and myself and Patrolman Colston came back in the office with these two items; the Lieutenant in charge wrote the report and tagged both guns.

Q. Were either of the two guns loaded at the time you found them?

A. Yes, sir. Both of them were. Yes, sir.

Q. Were both guns fully loaded?

A. Yes, sir.

Mr. Leggett: If the Court please, I am going to object [fol. 117] to the continuous leading of the witness.

The Court: Just let the witness tell what he found. You are testifying and he is sitting there saying, "Yes, sir," "Yes, sir." Ask him what he found and what it was.

A. Yes, sir. I found the .38 with .38 shells, six of them, and the .32 fully loaded.

Q. After you found the two weapons what did you do then?

A. Gave them to the Lieutenant in charge, as I said, and I tagged both the same and Pat Ciafardini took the two guns in the back and called, "Bring Mr. Sykes back out to question him."

Q. Did you question him in regard to the two pistols?

A. Yes, sir. Detective Ciafardini did and then in the meantime sent me back down to check the trunk of the automobile.

Q. Did you check the trunk of the automobile?

A. Yes, sir, I did.

Q. Tell us what happened.

A. Oh—myself and the man that towed the automobile [fol. 118] from police headquarters to Fender's Garage, the man and myself both—the keys wouldn't work in the trunk to unlock the trunk, so we had to get in through the back seat. We had to remove the back seat and we had to get in through that way. And upon—do you want me to just name everything I found?

Q. Tell us what all you found.

The Court: Show him those exhibits that have already been filed.

Q. I will ask the marshal to show you Government Exhibit No. 1, which purports to look like a pillow case and the items contained therein and tell us whether or not you have seen those same items before.

A. Yes, sir. I have seen this before.

Q. Now, that is the cap.

A. Black and white.

Q. Now, you don't have to take out each. State whether or not that is what you found in the back end of the car or if you found anything that isn't there.

A. Yes, sir. Everything is there, sir.

[fol. 119] Q. What did you do with the material after you found it?

A. Gave them to the Lieutenant in charge. He wrote it in the report and tagged the same, each article.

Q. Who was the Lieutenant in charge?

A. Lieutenant Bishop, sir.

Q. Is the tag there for the sack of material?

A. Yes, sir.

Q. Would you look at the tag and see if that is the same tag that was put on there that night?

A. Yes, sir. That is, sir. Same tag.

Q. After you found the items in the glove compartment and in the luggage compartment, of the automobile, did you attempt to question any one of the defendants?

A. Yes, sir. I went back into headquarters, back in the squad room, with Pat Ciafardini, questioning Mr. Sykes and Mr. Sykes admitted that he was in—that him and two other fellows intended to rob a bank in Berry, Kentucky, [fol. 120] but didn't say about the other two boys. There

was supposed to have been two other fellows that he mentioned to us, but he didn't include these two boys.

Q. Did he give you other names?

A. Right offhand, sir, I can't remember whether he did or not.

Q. After he gave you that information, what did you do then?

A. We placed him back in custody in jail.

Q. Did you attempt to question the other two defendants?

A. Yes, sir. We questioned all three of the defendants, sir.

Q. Did you question the defendant Strunk? You did question the defendant Strunk?

A. Yes, sir.

Q. Did he tell you or give you any information about the items which you found?

A. No, sir. They didn't know nothing about them.

Q. Did you question the defendant Preston?

[fol. 121] A. Yes, sir.

Q. Did he tell you anything about the items which you found?

A. No, sir.

Mr. Meade: You may examine.

The Court: Members of the jury, the statement which this witness said was made by the defendant Sykes may be considered by you as affecting the guilt or innocence of the defendant Sykes, but it is not to be considered by you as having any bearing whatsoever upon the charges as to these other two defendants.

As I understand, they were not present when he made that statement?

The Witness: No, sir. The other two fellows?

The Court: Yes.

The Witness: No, sir.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Officer Dotson, at the time these people were in the police station, were they searched?

A. Yes, sir.

Q. And were they required to take everything out of their [fol. 122] pockets and lay it there on the counter in the Newport police station?

A. Yes, sir.

Q. And they took out their car keys and their wallets and everything else that they had?

A. Yes, sir.

Q. And when you and Detective Ciafardini went out to investigate this automobile, did you take the keys to the car along with you?

A. Yes, sir.

Q. Now, who all had keys of these three defendants, just Mr. Sykes?

A. Yes, sir.

Q. Mr. Sykes. And you took these keys which he had and went out there to the automobile?

A. Yes, sir.

Q. And you tried these keys to open the trunk, is that right?

A. Yes, sir.

Q. And the trunk wouldn't open with any of those keys?

A. No, sir.

Q. And then how did you get access into the trunk?
[fol. 123] A. Removing the back seat.

Q. Now, to do that, will you explain to the jury what you did? Did you take out the bottom seat or what did you do?

A. Yes. We moved the bottom seat forward and then reached back—the back seat is on like, clips like, and you just lift them up and it comes off. The back seat comes off and then there is like a cardboard, a long cardboard, and then you go under, lift that out of there and go under.

Q. When you removed this back of the seat, you took it out and then was that cardboard intact?

A. Was the cardboard intact?

Q. It was in place?

A. It was in place, but it wasn't tacked or nothing.

Q. You just shoved it out of the way?

A. Yes.

Q. And then you were able to get in the trunk of the automobile itself?

A. You were in the trunk of the automobile.

[fol. 124] Q. There is a cross-member or an X-frame member there, isn't there?

A. No.

Q. Can you just crawl right straight into the trunk?

A. Uh-huh.

Q. And when you got in the trunk you used your flashlight and looked around and found this material?

A. That's true, sir.

Q. Prior to the time of arrest, did you question the defendant Sykes about the ownership of this automobile?

A. Yes, sir.

Q. And what did he tell you?

A. He said he was the owner of the automobile.

Q. And did he tell you when he purchased it?

A. Well, he said he just purchased it.

Q. Did he say he bought it that same day?

A. That I don't remember.

[fol. 125] Q. But he had just purchased the automobile?

A. That is what he said.

Q. And where had he purchased this automobile?

A. I don't know.

Q. He didn't tell you that, is that right?

A. No, sir.

Q. Officer, did you make an examination of the glove compartment of this automobile?

A. Yes, sir. No, sir, I didn't. I wasn't in the glove compartment. No, sir.

Q. You saw the glove compartment opened?

A. Yes, sir.

Q. Did you at any time subsequent to the time that the glove compartment was opened make an examination of that glove compartment?

A. No, sir, I never.

Q. Do you know whether the lock on that glove compartment operated?

A. Do you mean if it was locked?

Q. Yes.

[fol. 126] A. No, it wasn't locked at that time.

Q. It was not locked at that time, but did you examine it to see whether there was any damage to that lock?

A. No, sir, I did not.

Q. Now, you found all of this material locked in the trunk of this automobile, is that correct?

A. Yes, sir.

Q. And to get to it and to get it you had to remove that rear seat?

A. Yes, sir.

Q. And so far as you know, that is the only access that the defendant Sykes had to that material? He would have to remove the rear seat to get in there, wouldn't he? He didn't have the key to the trunk, did he?

A. Well, he—the man, Mr. Sykes says at the time, he said that it—something was wrong with the lock, that the key—he had to work the key, but we worked the key on it and still couldn't get it unlocked.

Q. You don't know how the material that you found in [fol. 127] that trunk got in there, do you?

A. No, sir.

Q. The only thing you can say is that it was in there?

A. Yes, sir.

Q. Officer Dotson, did you observe Detective Ciafardini removing certain firearms from this vehicle?

A. No, sir, I did not, sir.

Q. Did you have occasion to look at those weapons—I believe you identified them on your direct examination?

A. Yes, sir. I identified them. Yes, sir.

Q. And when did you first see them?

A. When they got them out of the glove compartment.

Q. You say them after taken out of the glove compartment?

A. And then we went into headquarters.

[fol. 128] Q. Now, this .32 here, which is marked Government Exhibit No. 3, you stated that you saw him remove that weapon?

A. Yes, sir.

Q. Is there any particular way that you can identify that weapon, sir?

A. You mean myself?

Q. Yes.

A. No, sir. I never marked it, outside of this here being —the barrel of it right here (indicating), being busted.

Q. Now, I believe you stated that that weapon was fully loaded at the time?

A. Yes, sir.

Q. And how many cartridges did it contain?

A. It contained five, sir.

Q. Now, I hand you Government Exhibit No. 2 and ask you to state whether or not you saw that exhibit previously.

A. Yes, sir.

Q. Is there any particular way that you can identify that weapon as being the one removed from the glove compartment?

[fol. 129] A. Only by this handle here.

Q. Then there is a mark on the handle, is that right?

A. That's right.

Q. What is that mark?

A. From a pencil, I believe, sir; some kind.

Q. A pencil mark on the handle. And was this weapon fully loaded?

A. Yes, sir.

Q. And how many cartridges were contained in it?

A. Six.

Q. Did you make any investigation as to the ownership or registration of these two hand weapons?

A. No, sir, I didn't.

Q. You didn't check out the serial numbers?

A. No, sir.

Mr. Leggett: No further questions, Your Honor.

The Court: Stand aside.

Call your next witness.

[fol. 130] CLYDE H. BISHOP being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Will you tell the jury your name?

A. Clyde H. Bishop.

Q. And you are a lieutenant with what police department?

A. Newport police department.

Q. How long have you been with the department?

A. Fourteen years.

Q. Mr. Bishop, do you know the three defendants sitting at counsel table to my right?

A. Know them? I had an occasion to meet them on January the 20th of this year.

Q. What was the occasion?

A. They were brought to police headquarters and charges were placed against them and they were placed in jail.

Q. What were your duties that night?

[fol. 131] A. I was officer of the 10 p.m. to 6 a.m. shift.

Q. And as the officer in charge, what were your duties?

• A. My duties are to run the shift.

Q. To run what?

A. The shift.

Q. Run the shift?

A. The 10 p.m. to 6 a.m. shift, in charge of the personnel on that shift.

Q. Were you present when these defendants were searched?

A. Yes, I was.

Q. Their person?

A. I was in an adjoining room. They were in the squad room and I was in the office proper.

Q. Were you present when the automobile belonging to one of the defendants was searched?

A. No, I was not.

Q. Do you know whether or not any items were found on their person or found in their automobile?

[fol. 132] A. Yes, sir. There were several items found in the automobile.

Q. Did you see those items that night?

A. Yes, I did.

Q. Where did you see them?

A. In police headquarters proper, in the office, and also in the squad room.

Q. I will have the marshal hand you a sheet of paper and ask you to tell us what that is.

A. This is an official report of the Newport, Kentucky, police department.

Q. Who was that report prepared by?

A. By myself.

Q. What information is contained in that report?

A. The information contained in this particular report is the call that was placed with reference to the original run, the fact that they were brought to the office and the particular charges that were placed against these three men, also with reference to the automobile which they had in their possession, and the articles that were found in the same.

[fol. 133] Q. Did you make a list of the articles that were found in their possession?

A. Yes, sir.

Q. Did you enter those items on your police report?

A. Yes, sir.

Q. Who submitted that list of items to you?

A. Well, the items were brought into the office from the auto and they were placed on the table and there were other officers present, Detective Ciafardini, Dotson, Quitter, and Colston, and separated them, sorted them out, and made a list of them.

Q. I will have you take a look at the Government Exhibit No. 1 and ask you to look inside the pillow case and see if those are the same items which you made a list of on your police report that night. Do you find the tag inside the pillow slip?

A. Yes, sir.

Q. Not the license tag.

A. Yes, sir.

Q. No, I say not a license tag. Do you find any other type of paper tag?

A. This is the record number (indicating).

[fol. 134] Q. Who made that record?

A. Myself. This was made by myself.

Q. And for what purpose did you make the record?

A. This is for purpose of identification. Also it shows that these particular items pertained to that particular case, under that specific record number.

Q. What did you do with the stuff after you made out the tag?

A. Well, as I replaced—well, it was all replaced in this pillow case and locked in that police safe that we have right there at headquarters. All the equipment was placed in the safe under this particular record number.

Q. Do you know what happened to them after they were placed in the safe?

A. To my knowledge they remained there until such time as they were brought over here, to my knowledge.

Mr. Meade: All right, sir. You may examine.

[fol. 135] Cross examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. What time was it when you first saw these three defendants on January the 20th, Lieutenant?

A. Well, I would say approximately 3:10 or 3:15, somewhere around that.

Q. And this material in front of you, this Government Exhibit No. 1, when did you first see it?

A. Oh, I imagine it was, say, 10, 15 minutes after that particular time.

Q. And did you see it in the automobile of the defendant?

A. No, sir.

Q. When did you first see it? Who had it?

A. When it was brought into police headquarters proper by one of the officers. I don't recall which of the officers.

Q. You don't know of your own knowledge where that came from?

A. That's correct.

[fol. 136] Q. You only know what somebody else has told you with respect to the course of it?

A. Yes, Sir.

Mr. Leggett: I have no further questions.

The Court: Stand aside. Call your next witness.

WILLIAM G. MONROE being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. What is your name, sir?

A. William G. Monroe.

Q. Are you also known as Billy?

A. Yes, sir.

Q. Where do you live?

A. 641 West 11th.

Q. Covington?

A. Yes, sir.

Q. What did you do—

A. Bartender.

Q. Bartender?

A. Yes, sir.

[fol. 137] Q. Whereabouts?

A. Depot Cafe.

Q. I can't hear you.

A. Depot Cafe.

Q. Sir?

A. Depot Cafe.

Q. Depot Cafe. And how long have you been a bartender at the Depot Cafe?

A. Eight, nine months.

Q. Were you bartender there in January of this year?

A. Yes, sir.

Q. What are your hours?

A. 4:30 until 1.

Q. 4:30 in the afternoon until 1 o'clock in the morning?

A. Yes, sir.

Q. Who is your employer at the Depot Cafe?

A. Red Murphy and Lloyd Wells.

Q. Is that James Red Murphy?

A. (Nodding affirmatively)

Q. Do you know the defendants, Kenneth Strunk and John Sykes and John Preston, who sit at counsel table?

[fol. 138] A. Yes, sir.

Q. How long have you known these men?

A. Since January.

Q. What part of January?

A. The first, around the first.

Q. How did you know these men?

A. Not very well.

Q. Where did you become acquainted with them?

A. In the bar where I work.

Q. That is the Depot?

A. Depot.

Q. Did you see them in the Depot Cafe how often?

A. Pretty often.

Q. How often is pretty often?

A. Three, four times a week. Five times.

Q. Were they there individually or together?

A. Sometimes by themselves, sometimes together.

[fol. 139] Q. Did you ever see all three of them there at one time?

A. Yes, sir.

Q. And how often would you see the three of them together?

A. Occasionally.

Q. Were you aware of their arrest on the charge which is being tried here now?

A. Yes, sir.

Q. And how did you become aware of it?

A. Newspaper.

Mr. Leggett: If the Court please, I would like the witness to be instructed to speak up a little louder and more clearly. I can hardly hear what he is saying.

The Court: Talk out a little louder, Billy.

The Witness: Yes, sir.

Q. Did you ever overhear any conversation carried on among the three defendants?

A. Yes, sir.

Q. Do you know what their normal conversation would be?

[fol. 140] A. Not all the time. I am in the front most of the time.

Q. Did you ever hear them discussing any matters?

A. Yes, sir.

Q. What matters have you heard them discuss?

A. Lots of things. A bartender hears a multitude of sins from everybody.

Q. A bartender hears what?

A. He hears a lot of things from everybody.

Q. Can you remember any specific items of discussion?

A. Yes, sir.

Q. What items do you remember?

A. Just the one that I told Officer Shipley about.

Q. What was that?

A. About the morning that I told the man that I was going to rob a place before he got there.

Q. About what?

A. That I told Officer—

Mr. Meade: You will have to talk out.

[fol. 141] The Court: Tell what happened, young man. Just tell that jury over there what happened.

A. These boys was talking together. They said they had a big job planned and never said what it was or anything else.

Q. Did they say where it was?

A. No, sir. And I jokingly said, "Well, I am going to get it before you get there," and that is all.

The Court: When was that?

The Witness: I can't recall the date, but it was after January the 1st.

The Court: 1961?

The Witness: Yes, sir.

Q. Did you ever hear them say at all where they might be going to pull a big job?

A. No, sir.

The Court: Where was that, Billy? Was that at the bar?

The Witness: No, sir. It was in the back room.

The Court: At a table?

The Witness: Yes, sir. I served a drink to the back table.

[fol. 142] We didn't have a waitress.

The Court: You served the drink back there yourself?

The Witness: Yes, sir.

The Court: These three defendants were there?

The Witness: Yes, sir.

The Court: Anybody else?

The Witness: I think there was a couple of girls with them.

The Court: Now, just tell the jury what they said and who said it, if you can remember, just what happened. Tell just what happened. You went back to serve the drinks there at your bar. What time of day was it, night or day-time?

The Witness: It was of an evening, about 6:30, 7 o'clock, I guess.

The Court: All right. You carried the drinks back and served them the drinks. What was said and who said it?

The Witness: They was all sitting and talking at the table.

The Court: Just tell what happened.

[fol. 143] The Witness: I don't know what they was doing or anything else, but when I walked back, they started talking to me and they said they got a big one on. I didn't know what it was. They didn't say what it was, might have been anything, and I joking with them, said, "Well, I am going to get it before you get it." And that is all that was said and I walked on back to the front bar.

Q. Did they say whether or not they had made any plans to pull a big job?

A. No, sir. No.

Q. To refresh your memory, Billy, did you or not tell the agents of the FBI that Sykes said that they had been to Berry, Kentucky, but had been scared off by the state police?

Mr. Leggett: If the Court please, I am going to object to this.

The Court: Overruled. He may cross-examine him on it.

A. I don't remember whether I said it or not. I might have said it.

Q. Sir?

A. I might have said it. I don't know.

[fol. 144] Q. Well, do you remember hearing Sykes say that?

A. I couldn't recall hearing him saying it. I don't know for sure.

Q. You can't recall now?

A. No, sir.

Q. Did you also tell the agent of the FBI that Sykes related that, "We are going back tomorrow to get it"?

A. That is what the conversation was about.

Q. You do remember—

A. Yes, sir.

Q. (continuing)—hearing him say that?

A. Yes, sir.

Q. Billy, do you have anything to fear from testifying here today?

A. No, sir.

Mr. Meade: All right. You may examine.

Cross-examination

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Billy, you are a bartender, is that correct?

[fol. 145] A. Yes, sir.

Q. And how long have you been employed there at the Depot Cafe?

A. I don't know. About eight, nine months.

Q. About eight or nine months. And I believe you stated that you saw these three defendants in there during the first part of January, is that right?

A. Yes, sir.

Q. Did you ever see them in there before January?

A. I couldn't have.

Q. You weren't there or what?

A. I was in jail.

Q. Oh, you were in jail. And they came in there between

the first of January and the time of their arrest, maybe three or four times a week, is that right?

A. Yes, sir.

Q. Now, did they always come in together or—

A. No, sir.

Q. Now, I will ask you to state whether or not you have [fol. 146] known Preston longer than you have known the other two?

A. I have known Preston a lot longer than I think Sykes and the other boy.

Q. Now, is Preston also a bartender?

A. I don't know. I met Preston I think just when I got out of jail, I had known him longer than I knew Sykes and the other boy.

Q. Where did you meet Preston?

A. At the bar where I work.

Q. At the Depot?

A. Yes, sir.

Q. Did you ever meet him out at the Alpha Club?

A. No, sir.

Q. Did you know whether he was employed out there?

A. No, sir, I didn't.

Q. I am going to show you Government Exhibit No. 3 for identification and ask you to look at this carefully (handing exhibit to the witness). Do you recognize that gun?

A. I can't positively say so. I would say I recognize a [fol. 147] gun like this. Someone tried to sell me one like this and I wouldn't buy it.

Q. Someone tried to sell you a gun similar to that?

A. And I wouldn't buy it.

Q. Now, you stated that on one evening, about 6:30 or 7 o'clock, there was a conversation in which you were present and there was a discussion about a big job, is that right?

A. Most everybody in the place says stuff like that.

Q. And you stated that all three of these defendants were present, is that correct?

A. Pretty sure.

Q. Now, —

A. (continuing) I am not going to swear it, but I believe they were all three.

Q. You don't want to swear to it, but you do believe that they were all there?

A. Yes.

Q. Do you specifically recall which one you heard talking about this job?

A. No, sir.

Q. Now, did you state that there were a couple of girls [fol. 148] present at the time?

A. I think so.

Q. Now, was the reference to this big job such that it could have been a job of putting a furnace in a building?

A. It could have been anything.

Q. It wasn't particularly used in the sense that they were talking about saying pulling off a robbery or something like that, it was just referred to as "a big job that we are going to do," is that it?

A. I don't know. I can't say one way or the other.

Q. You just remember generally that there was some conversation. Mr. Monroe, I will ask you to state whether or not you have ever had any difficulty with Mr. Sykes?

A. Only one time. I never had any trouble with him at all.

Q. Well, what was this one time? Did he have some difficulty with you?

A. No, he had some difficulty with the owner.

Q. Were you involved in that dispute in any way?

[fol. 149] A. I was told to put him out, bar him out of the saloon. That is all.

Q. Did you get in a fight with him at that time?

A. No, sir.

Q. I will ask you to state whether or not you recall a couple of customers in this establishment called Chuck and Marvin?

A. Who?

Q. Chuck and Marvin. Do you recall ever introducing these two people to Mr. Sykes?

A. No.

Mr. Leggett: I have no further questions.

The Court: Stand aside.

Is that all of this witness?

Mr. Meade: Yes, Your Honor.

[fol. 150] (Reporter's note: The court recessed until 9 a.m., the following day, to-wit, March 17, 1961, at which time the defendants were present with their counsel, all of the jurors were present and resumed their place in the jury box, and the following occurred:)

The Court: Call your witness.

Mr. Leggett: If your Honor please, may we have permission to approach the bench?

The Court: Yes, sir.

Mr. Leggett: With respect to two questions as to the last witness, Mr. Monroe, and the answers given by him, from the statement made to Agent Shipley of the FBI, we would [fol. 151] like to request the Court to give a limited instruction that those questions and answers be considered by the jury with relation only to the witness' credibility rather than substantive proof of the acts, the statements which were made.

In particular, the first question was something—"Did you say to Agent Shipley that these men were seated in this establishment and talking about pulling a job off in the City of Berry, Kentucky?" And the second question—I forget the contents of the second question, but it was roughly in the same vein.

We would like to request a limited instruction that that be considered only for the purpose of credibility rather than substantive proof.

The Court: The witness was an unwilling and hesitant witness. He was laboring under some restraint of either fright or hesitancy because he did not want to talk. I couldn't tell. He was very obviously an unwilling witness and I think the questions asked were more in the nature of a cross-examination, which he had a right to do with an unwilling witness.

Let the motion be overruled.

Mr. Leggett: Note my exception if Your Honor please.

[fol. 152] The Court: You are given an exception.

(Thereupon the Colloquy at the Bench Ended)

RALPH HUTTON, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. State your name.

[fol. 153] A. Ralph Hutton.

Q. Where do you live, Mr. Hutton?

A. I live at Berry, Kentucky.

Q. How long have you lived at Berry, Kentucky?

A. My entire lifetime.

Q. What is your business?

A. I own a farm supply store and operate it.

Q. Located in—

A. In Berry, Kentucky, yes, sir.

Q. And how long have you had a farm supply store in Berry?

A. Thirty-one years.

Q. What size of a town is Berry, Kentucky?

A. Well, I don't know the exact population, but it is in the neighborhood of 400. It has a big radius that is a pretty good drawing center.

Q. Sir?

A. It has a big radius that is a pretty good drawing center.

Q. What size is the business section of the town of Berry, [fol. 154] Kentucky?

A. Well, it extends about two blocks.

Q. About two blocks?

A. On Main Street. And then up the side street, say one block on part of the section.

Q. Where is your feed and grain store located in relation to the Bank of Berry, Kentucky?

A. Well, it runs back to the L. & N. Railroad, back to the first street away. It's—well, the back end of the building is less than a half city block away and there is no obstruction to the bank. It is open to that side. It is just across the railroad.

Q. Just across the railroad?

A. Just across the railroad tracks. There is no buildings in between.

Q. Do you know most of the people in the town of Berry?

A. Yes, I do.

Q. Mr. Hutton, do you know either of the three defendants or have you ever seen either of the three defendants?

A. I do not know them, but I have seen one of them definitely and the other one I recognize. His hair is different [fol. 155] from when I saw him.

Q. Which one do you definitely recognize?

A. The man in the tan suit.

Q. Would you point him out and have him stand up?

A. To the left.

Q. The one on the left?

The Court: Would you mind standing?

(Reporter's note: The defendant indicated to the witness stood.)

The Court: Designating Sykes, is it?

Mr. Meade: Sir?

The Court: What is his name?

Mr. Meade: This is Mr. Sykes, is it not?

The Defendant Sykes: That's correct.

Q. And you say you definitely recognize this man?

A. Yes, sir. I recognize seeing him in the town of Berry, yes.

[fol. 156] (Reporter's note: The defendant Sykes resumed his seat.)

Q. What was the occasion?

A. Well, I wouldn't know the occasion, he was driving around.

Q. When was this, sir?

A. Well, it was in, I would say, early January. I wouldn't know the date because I did not put that down.

Q. January of what year?

A. Of 1961 or the past January.

Q. Do you know what type of an automobile he was driving around there?

A. I would say it was a Buick, offhandedly. Now, I could

be wrong about that, but I think it was a General Motors car.

Q. Was there anyone else with him at that time?

A. Yes, sir. The man with the mustache there is the man that I identified—he looked like the man driving. He had a different haircut at that time and it was very wavy and kind of over.

Q. Would you state which one that is?

A. That is the man in the middle.

[fol. 157] Q. Is that the man next to Mr. Sykes?

A. To the right of Mr. Sykes.

Mr. Meade: Would you please stand.

The Defendant: There is no one to the right of Mr. Sykes.

The Witness: To my right of him there is.

(Reporter's note: The defendant indicated by the witness stood, and then resumed his seat.)

Q. You say you are positive or not positive?

A. Well, I wouldn't say sure, no, sir, but he has a very pronounced resemblance.

Q. Did the man that you saw have a mustache?

A. No, sir. I didn't think so. I didn't notice it.

The Court: Let the record show who he is indicating, Mr. District Attorney.

Mr. Meade: Let the record show that the person he is indicating is Mr. Preston. Is that correct?

[fol. 158] (Reporter's note: No answer was made by the defendant Preston.)

Q. Did you ever see the defendant Mr. Strunk before this?

A. I have never seen him that I know of. No, sir.

Q. What were these individuals doing—you say they were driving in an automobile?

A. Yes. They were observing things, they were looking from side to side and driving very slow and the second time that I saw them they came down to an intersection and stopped there and then went over the town and over the hill towards U. S. 27. That is the last time that I saw them in town.

Q. How many times did you see them?

A. I saw them on two occasions and there was not too much difference between the time, but I did not observe them too much on the first occasion.

Q. Over what period of time did you observe them on the second occasion?

A. I would not be definite on that because I had no reason to be the first time. I would say it could be five to 15 minutes maybe.

[fol. 159] The Court: Mr. Hutton, you say on two occasions, you mean on two different days?

The Witness: No, I do not, Judge.

The Court: On the same day?

The Witness: Yes, that's right.

The Court: All on one day?

The Witness: That's right.

Q. Can you tell the jury why you noticed these men in particular?

A. Well, the first time I didn't—they were not observing too much, but when I saw them the second time, they were looking at different objects and they looked in my place of business. They looked in the place next to it and looked up and down the street there and went out of town and you know when a stranger comes—now, if an elderly person comes in our town that has been there before and looks around, you don't think a great deal, but a small town like ours, when a person comes in, you will naturally observe it if they are very observing and I have had a habit of doing that on a few occasions.

Mr. Meade: You may cross-examine.

[fol. 160] Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Hutton, what is your occupation, sir?

A. I am a merchant.

Q. You are a merchant?

A. Yes. Farm supply.

Q. What,——

A. Farm——

Q. —please?

A. Farm supply merchant.

Q. Farm supply merchant. Now, do you have a store located there in Berry, Kentucky?

A. I do, sir.

Q. Where is it located with reference to the business section of town?

A. Well, I would call it in the business section. It is one-half a square off Main Street, less than a half square.

Q. One-half square off of Main Street?

A. That's right.

Q. Now, for our purposes, say the main street runs this way (indicating).

[fol. 161] A. East and west, Main Street.

Q. It runs east to west?

A. That's right.

Q. And your store—

A. I am to the south, south of Main Street. Yes, sir.

Q. And about half a block south of Main Street?

A. Less than half a block. There are two buildings between me and Main Street.

Q. Two businesses?

A. Yes, that's right. And then I run from this street down to the railroad, the warehouse.

Q. And do you have a show room in the front of your building, sir?

A. That's right.

Q. And what do you have, farm equipment in there, or what?

A. No, I have feed, seed, fertilizers and different things that you have in farm supply.

Q. Different things relating to the farm?

A. That's right.

[fol. 162] Q. And you are occupied there in the front of the store almost constantly serving the trade, is that correct?

A. I wish I were constantly, yes, but I am not. No, farm supply—

Q. You have customers?

A. (continuing)—is a seasonable business. When you are busy you are too busy and when you are not busy you would like to have some business.

Q. Now, directing your attention to this first part of January, could you tell the jury approximately what date in the first part of January this was that you saw the defendant there?

A. That would be impossible. No, I couldn't—I could not do that.

Q. I wonder if you could pin it down to some particular day of the week?

A. I could not do that.

Q. And I wonder if you can't tell us whether it was the 1st or the 18th?

A. Well, I tell you, the only thing that I know, it was prior to the articles we saw in the paper in regard to the Berry hold-up.

Q. It was some—

[fol. 163] A. Anticipated holdup.

Q. It was some time prior to the 20th?

A. That's right. It was in advance of that.

Q. Now, as I understand you stated that you saw these men twice. Did they drive past your place of business on two separate occasions?

A. Yes, they did. Yes, sir.

Q. And they were driving some type of General Motors car?

A. I would say that, yes.

Q. Do you recall the color of the automobile?

A. Yes, I do.

Q. What color?

A. It had a cream-colored body and had a dark top.

Q. Cream-colored body, a dark top. Would you say it was brown or black?

A. No, I would say it would be to the black side.

Q. Now, did you notice anything peculiar about this auto-
[fol. 164] mobile, any distinguishing marks?

A. There was an emblem on the back.

Q. An emblem on the back?

A. Yes.

Q. Is it one that is normally carried on a General Motors car?

A. That is what I would say, yes. In the back end of it. I would say it was a Buick car of not too late a model.

Q. Now, when you observed this automobile, from which

side were you looking, the driver's side or the passenger side?

A. I was on the driver's—I was to the driver's side.

Q. To the driver's side?

A. That's right.

Q. Then you were actually across the street from it, is that correct?

A. Now, get me right there. What did you say?

Q. You observed it from—

A. Well, he was going north on Third Street and I—my place of business is on the west side of Third Street,—
[fol. 165] Q. Uh-huh.

A. (continuing)—which would be across the road, yes.

Q. It would be across the street?

A. I would say it would be as far away as from here to the first row of seats possibly.

Q. And let me get this straight. Who was driving the motor vehicle as you recall?

A. The man that I would—can fairly well identify is the man in the center there (indicating).

Q. The man in the center? Now, you—

A. Yes, sir.

Q. Now, you mentioned that—

A. (continuing) And they both were looking towards the place of business and they both looked at the next place of business and down at the corner and they stopped a little longer than normal at the corner and then went out of town very slowly over the hill.

Q. Now, you stated that this man who operated the motor vehicle had a different hair-do or a different haircut. I [fol. 166] wonder if you could describe to the Court and jury what—

A. It was very curly. It was longer than it is, too, than it is today.

Q. It was long and curly?

A. It—well, it was kinda wavy to one side.

Q. Now, I assume that you observed these men—it was on a week day rather than Sunday?

A. Oh, it wasn't Sunday.

Q. And it wasn't Sunday and is your place of business open all day on Saturday, open on Saturday?

A. Yes.

Q. Could it have been on Saturday?

A. Well, I try to close early on Saturday, sometimes around 2 o'clock, sometimes I don't get the job done.

Q. Is this Berry, Kentucky, like most of these farm towns, do most of the people in the surrounding community come into town?

A. Well, there is a lot according to the weather. That is true mostly.

[fol. 167] Q. Usually there are a lot more people in town on Saturday than other days. So, if this had happened on Saturday, you probably would have remembered it, wouldn't you?

A. Well, I wouldn't say so, because it could have been a day that there is not as many people in. There was nobody in at the time. Had there been, I possibly would not have saw them because I had my mind on something else.

Q. Now, Mr. Hutton, think carefully and see if you can recall if this event happened, say the day before or two days before you read about this incident in the newspaper?

A. I would not explore on it that far, no, sir. I wouldn't make a statement on that, because I wouldn't know.

Q. Do you think it was maybe a week before or something like that?

A. It was a week, I would say that much. I would think it would be.

Q. That is your best recollection on this?

A. That's right. You know, if you had that to go over again, you could have some figures on it and dates, but you [fol. 168] know—there is nothing had offended anybody or no crime involved.

Q. Well, if it had happened the day before, it would have been pretty vivid in your memory?

A. Oh, yes.

Q. And if it happened two days before, it would be pretty vivid in your memory?

A. Well—

Q. And if it happened a week before, it would be rather vague.

A. Well, I wouldn't say because I made a note.

Q. You made a note?

A. Yes, I did.

Q. And on that note did you make a note of the date that you saw these—

A. No, I did not. No.

Q. Mr. Hutton, could you tell the Court and jury what these men were wearing at the time that you observed them?

A. Now, that would be going a little bit too far. You can't look at faces and clothing and those things when a car is going by your place of business. The car went by [fol. 169] slow, I will grant you that.

Q. Yes, sir. I wondered, could you—

A. Now, a woman could tell you that there, but I couldn't tell. I could look at these men here and turn around the other way and not tell what they had on.

Q. You might be able to tell whether they were wearing a sport shirt or shirt and tie or how they were attired. That is generally what I am asking.

A. I wouldn't want to explore on that.

Q. You wouldn't want to try?

A. I would say possibly they could have been wearing jackets, possibly, they could.

Q. Now, that would be a guess?

A. Yes, just going back and picturing it for two months back, I would say that they could be wearing jackets.

Q. They could be?

A. Yes, sir. I wouldn't want to pin myself down on that.

Q. What kind of automobile do you own, sir?

[fol. 170] A. Well, I have a Nash and I have an Oldsmobile.

Q. I will ask you whether or not you have seen these men at any time subsequent to the time that you observed them there in the City of Berry?

A. Not until I saw them in this courthouse.

Q. And when did you see them here in the courthouse?

A. I saw them yesterday and today.

Q. You went back to the marshal's office and observed them back there, at that time?

A. Well, I was going through there and I saw them in the cell.

Q. And you went through there at the instance of the FBI agent?

A. I wouldn't say that. I don't—instance?

Q. Did he request you to verify your identification at the time?

A. Who? The FBI agent?

Q. Yes.

A. At what point do you mean?

[fol. 171] Q. When you walked through the marshal's office back there.

A. Well, I was called back to the marshal's office to talk to them and I went back through there.

Mr. Leggett: I have no further questions, Your Honor.

The Court: Is that all?

Mr. Meade: That is all.

The Court: You may stand aside, Mr. Hutton. Call your next witness.

Mr. Meade: Your Honor, we would like to excuse this witness if they have no objection.

Mr. Leggett: We have no objection.

CHARLES BELL, JR., being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. What is your name?

A. Charles Bell, Jr.

Q. Where do you live, Mr. Bell?

A. Berry, Kentucky.

Q. How long have you lived in Berry, Kentucky?

[fol. 172] A. Thirty-six years.

Q. How old are you?

A. Fifty-five.

Q. Do you work in Berry, Kentucky?

A. Yes, sir.

Q. What do you do?

A. Cashier of the Union Bank.

Q. That is the Union Bank of Berry?

A. Of Berry, yes, sir.

Q. How long have you been with the Union Bank?

A. Thirty-five years.

Q. How long have you been a cashier?

A. Thirteen.

Q. How many banks do you have in the town of Berry, Kentucky?

A. One.

Q. What—where is the closest bank to Berry, Kentucky?

A. Cynthiana.

[fol. 173] Q. And how far away is that?

A. Fourteen mile.

Q. Is the Union Bank of Berry a state bank?

A. Yes, sir.

Q. Are the deposits of the Union Bank insured—

A. Yes, sir.

Q. (continuing)—by the Federal Deposit Insurance Corporation?

A. Yes, sir.

Q. Do you have a charter or a certificate indicating that?

A. I do. Yes, sir.

Q. Under what certificate number is the Union Bank of Berry's deposits insured?

Mr. Leggett: I object, Your Honor. Best evidence.

The Court: Does he have the certificate here?

Mr. Meade: Yes, he does.

The Court: I think he may answer. Overruled.

Mr. Meade: Go ahead, sir.

[fol. 174] A. No. 5851.

Q. When did—what was the date when your certificate was issued?

A. The 21st day of September, 1950.

Q. And is the insurance still in effect?

A. Yes, sir.

Mr. Meade: If Your Honor please, we would like to introduce this as the Government's Exhibit 5 and I would also like to have it withdrawn at the end of this trial.

The Court: Is there any objection to that? Let it be marked filed as an exhibit in this case and then let him withdraw it immediately, and keep it in his possession.

Do you have any objection to that?

Mr. Leggett: No objection.

The Court: For the purposes of showing that. This is a Federal Deposit Insurance Corporation bank. Let the reporter give it a number and then by agreement of the parties, it is immediately withdrawn and returned to the witness, to be held by him subject to any further orders of the Court.

(Reporter's note: The FDIC certificate No. 5851, of the Union Bank of Berry, Kentucky, was marked Government's Exhibit 5 and was returned to the witness.)

Q. Mr. Bell, what is the usual or the average amount of cash which your bank has on hand?

A. From 12 to 15,000 dollars daily.

Q. Is there any time of the year when the cash in your bank would be more or less than that average?

A. Yes. In the summer and fall months it runs nine and 10; in the winter months, why, it might get up as high as 15 on account of our tobacco business.

Q. Can you give us a reason for that?

A. On account of tobacco business, which stimulates our trade and there is more demand for money at that time.

Q. Do you have any peak month?

A. Yes, sir.

Q. What month is that?

[fol. 176] A. December through January, and possibly February.

Q. Do you know the average amount of cash which the Union Bank of Berry had on hand during the month of January?

A. No. I do not know the average, but I would say it would be 13 or 14 thousand dollars.

Q. What type of police protection does the town of Berry, Kentucky have?

A. Just state police. We have no marshal.

Q. What about the sheriff's office in Harrison County?

A. It is 14 or 15 miles away.

Q. Do you know approximately what the population of Berry, Kentucky, is?

A. About 300.

Q. And what size is the business section of the town there?

A. Well, the business section is rather small. I would

say 500 yards comprises our main street and all businesses are located on it.

Q. Are you familiar with the financial status of the other business places in Berry, Kentucky?

[fol. 177] A. Well, I—

Mr. Leggett: Objection.

The Court: Overruled. I don't know the purpose of the question.

Q. I didn't hear your answer.

A. I think I am.

Q. Do you know whether or not any other business place in the town of Berry would have a substantial sum of money on hand?

A. I doubt it, being that close to the bank.

Q. Do most of the business places in the town of Berry use the facilities of your bank?

A. Yes, sir.

Q. Did you read about the incident which is on trial here, in the papers?

A. Yes, sir.

Q. Did you ever see either one of the three defendants who sit at counsel table to my right before this time?

A. No, sir.

Q. Did you notice anything unusual about the time this was supposed to have taken place?

A. No, I did not.

[fol. 178] Q. Did you have occasion to travel on Highway 27 around the 17th or 18th or 19th of January of this year?

A. It was the 18th, I had to go to Cynthiana to make a release at the clerk's office on the morning of the 18th.

Q. Did you notice whether or not on that occasion there were any police officials of any sort in the town of Berry, Kentucky?

A. No, sir.

Mr. Leggett: I will object, if the Court please; I can't see the purpose of this line of questioning.

The Court: I don't know that it has any particular evidential value, but I do not think his question is harmful in any way to the defendants. I don't know just what he is driving at. I will overrule the objection.

Q. Did you see any on Highway 27?

A. Yes, sir.

Q. Tell us what you saw.

A. Well, I would say five to six mile after I got on 27, on the top of a grade, there was two police cruisers, one on one [fol. 179] side of the highway and one on the other and they were out looking at the rear end of their cars and it was a dense fog that morning.

Q. Was that—what type of police cruisers?

A. State police.

Q. State police?

A. Yes, sir. We don't have county police.

Q. This was on your way to Cynthiana, you say?

A. Yes, sir.

Q. Were these police cruisers there when you returned?

A. No, when I returned, as I turned on 1032, which is the junction of 27 and 1032 to Berry, one cruiser was sitting on my left on 1032.

Mr. Meade: You may examine.

*Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Bell, how long have you been associated with the bank there in Berry?

A. Thirty-five years.

[fol. 180] Q. Thirty-five years?

A. Yes, sir.

Q. And I wonder if you would tell the Court and jury how many times that bank has been robbed during those 35 years.

A. None.

Q. Now, you stated that the little community there is approximately three to four hundred people, is that correct?

A. Yes, sir.

Q. And you have no marshal there in town?

A. No, sir.

Q. How close are you to the state police station down in that area?

A. Well, Williamstown is our closest. I would say 20 to 25 miles.

Q. About 20 to 25 miles. About how frequently do the state policemen come through checking the town there?

A. Well, I don't know that they have any regular time. We don't see them in there too often.

Q. Do they come every day or every other day?

[fol. 181] A. Oh, no. It is unusual to see them in there once a week.

Q. Do you have very much difficulty down there that requires police assistance?

A. No. Oh, no. We are peaceful and quiet.

Q. That is a little farming community and there is never any trouble to amount to anything down there?

A. No, sir.

Q. There wouldn't be much use to have a marshal out there, would there?

A. No, sir.

Q. He would be out of work most of the time, wouldn't he. Now, does the county sheriff come through there very often?

A. Yes, occasionally.

Q. About how often does he come through?

A. Maybe once a week, sometimes maybe not for two weeks.

Q. How long has it been since there was a robbery down there in Berry?

[fol. 182] A. Well, I would say in December, just before Christmas they robbed the department store, Mr. Fisher's department store.

Q. Was that one of these daylight robberies?

A. No, it was right after dark.

Q. Was it a robbery or burglary?

A. Burglary.

Q. Oh, burglary?

A. Yes, sir.

Q. How long has it been since a carload of gunmen came riding into town and walked in a place and pulled off a job right in the open?

A. Not within my knowledge.

Q. Not within your knowledge within the 35 years?

A. No, sir.

Q. Now, I believe you testified that during the winter months your bank has about what, \$15,000 on deposit there?

A. That is the limit. Now, that is not on deposit. That is cash that we keep on hand for operation.

Q. That is what you use in your daily activity in case [fol. 183] the demand comes in?

A. That's right. And we keep the bulk of that under a 15-minute time lock.

Q. Say that again.

A. We keep the bulk of that under a 15-minute time lock, in order to avoid holdups.

Q. I wonder if you could explain to the Court and jury exactly what this 15-minute time lock is so we can all understand. I am not too familiar with banks and safes.

A. About 15 years ago, the Mosler Lock Company invented a safe and that safe is out under the counter, it isn't in the vault, and we can not get into that safe until we plug an electric cord in there and it takes 15 minutes to open it. That is to discourage daylight holdups. That is about the only protection we have. And we keep approximately \$3,000 in the drawer to operate on. If anybody comes in and wants more than that, they just have to wait until that time lock opens.

Q. Now, is that system which you have there in the bank a matter of common knowledge in the community?

A. I doubt it.

Q. Do you have a burglar alarm system there on the [fol. 184] bank?

A. No, sir. No, sir.

Q. How frequently do you go down to Cynthiana, Mr. Bell?

A. Oh, four or five times a week.

Q. And on those trips do you frequently see the state police upon Route 27?

A. Yes, sir.

Q. Would you say that this occurrence which you observed on the 18th of January was an unusual one, to see maybe two cruisers congregated?

A. No. No, I wouldn't say it was unusual. We see them—

Q. Now, these state patrolmen, they operate what we call one-man cruisers, don't they?

A. That's right.

Q. And it has been your experience that you see them conferring on police business of one kind and another quite frequently when you go to Cynthiana?

A. Well, I wouldn't say frequently but I don't think anything about it. We see them around Falmouth, we see two together, and around Cynthiana, but I wouldn't know how [fol. 185] frequently it would be.

Q. But it isn't an unusual occurrence which would really surprise you when you see it happen. Now, is it unusual for a police cruiser to be parked there at the intersection of 1032 and Route 27?

A. No, sir.

Q. Aren't there some accidents there every once in awhile from cars pulling out, as I recall?

A. Well, I don't think there is as many accidents as there are speeders.

Q. That is a speedway down through there, isn't it?

A. Yes.

Q. And this 1032 is somewhat of a sheltered—is that a sheltered approach to the road?

A. No, no.

Q. Not particularly?

A. Not particularly.

Q. It is right on a straightaway, is it?

A. That's right. It is right easily seen.

[fol. 186] Mr. Meade: One further question. Are you through?

Mr. Leggett: (Nodding affirmatively)

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. I believe you testified that you had no alarm system for your bank. Do you have guards?

A. I didn't understand you, sir, that last question.

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Q. You testified you have no alarm system for your bank.
Do you have a guard?

A. No, sir.

Q. No guard?

A. No.

Recross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Bell, are you acquainted with Mr. Ralph Hutton?

A. Yes, sir.

Q. I will ask you to state whether or not you had occasion to discuss this case here with Mr. Hutton.

[fol: 187] A. Why certainly. We have discussed it as to the possibilities of it. I am in a small town and everybody knows everybody's business and we say, "What do you think about it? What do you think about it?"

Q. And you have conferred on this and it has been a prime topic of discussion among the business men in Berry?

A. Why, sure. That was the topic of conversation for several days.

Q. That more or less put Berry on the map?

A. It sure did.

Mr. Leggett: Thank you, sir.

The Court: That is all, Mr. Bell.

Do you have any objection to Mr. Bell remaining in the courtroom?

Mr. Leggett: We have no objection.

The Court: You may remain in or be excused.

The Witness: I would rather be excused, Your Honor.

The Court: You may be finally excused.

[fol. 188] JOHN M. BARRY, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. What is your name?

A. John M. Barry.

Q. You are an agent with the Federal Bureau of Investigation, are you not, Mr. Barry?

A. Yes, sir.

Q. How long have you been with the Federal Bureau of Investigation?

A. Approximately seven years.

Q. Where are you stationed?

A. Covington, Kentucky.

Q. I will have the marshal hand you a black box and ask you to look at it and tell the jury whether or not you have seen that before.

(Reporter's note: The marshal handed the box to the witness.)

A. Yes, sir, I have.

Q. And where did you see it before?

[fol. 189] A. The first time in the trunk of a 1955 Buick, on January 20, 1961.

Q. Do you know whose Buick this was?

A. Not from personal knowledge, no, sir.

Q. Where did you—where was the Buick at the time that you found this in it?

A. At Fender's garage, 8th and Ann Streets, in Newport.

Q. There is some type of a tag on the outside of this box. Did you prepare that tag?

A. Yes, sir, I did.

Q. Would you open the box and tell us whether or not there is something inside of it?

A. Yes, sir. There are several items in here.

Q. Were those items in that box at the time you found it in the automobile?

A: No, they were not.

Q. Where were those items?

A. Some of them were in the trunk and there was one item here in—

Q. Well, just take them out and tell us where you found [fol. 190] each of the items.

A. This piece of rope, twine, was in the trunk of the automobile. This pair of sunglasses was on the ledge behind the rear window inside of the automobile. And there was a piece of paper here with several names written on it, that was also in the trunk of the car, and the box itself was in the trunk.

Q. Did you know whose automobile it was that you were checking?

Mr. Elfers: Objection. He has asked that question once, Your Honor.

The Court: Overruled. Do you know whose box it was, of your own knowledge?

The Witness: No, sir, I do not.

Q. Do you have the license number of the automobile which it was taken from?

A. Yes, sir.

Q. What was that?

A. Taken from a 1955 Buick, two-door, hard-top, color green, serial number 4B110153, 1960 Kentucky license 529-545.

Q. Mr. Barry, did you ever have occasion to interview either one of the three defendants who sit at counsel table to my right?

[fol. 191] A. Yes, sir, I did.

Q. Which one of them or how many of them did you interview?

A. Kenneth Ray Strunk, myself and another agent interviewed on the morning of January the 20th at the Newport Police Department.

Q. Was either one of the other defendants present at the time you interviewed him?

A. No, sir.

Q. Did you question him in regard to the incident for which he was charged?

A. Yes, sir, I did.

Q. Did he tell you anything?

A. Yes, he did.

Q. What did he tell you?

A. Prior to the interview, we advised him of certain of his constitutional rights concerning his making a statement to agents. He was advised he did not have to make a statement, anything he said could be used against him, and of his right to an attorney. That was done prior to any interview with him.

The Court: Did you tell him who you were?

The Witness: Yes, sir.

[fol. 192] The Court: What did you tell him in that connection?

The Witness: We were special agents of the FBI, showed him credentials, and advised him of his rights.

Q. Did you question him in regard to the items which were found in the automobile?

A. Yes, sir, we did.

Q. What did he tell you?

A. He said he did not know anything about the guns that were found in the glove compartment or know anything about any of the other items that were found in the trunk.

Q. Did you question him in regard to the bank of Berry, Kentucky?

A. Well, we asked him the circumstances surrounding his being with these other individuals at the time of the arrest and then any knowledge that he had about any alleged robbery or any other law violation that anyone might have been contemplating.

Q. What did he tell you?

A. He said that his reason for being with John Sykes, whom he said was his brother-in-law, and John Preston was that on the previous evening, around 8 or 9 o'clock, he was [fol. 193] at his brother-in-law's residence to fix a door latch or put a night lock on, and that he and Sykes then went out together in Sykes' 1955 Buick, where they went over to a used car lot on Sixth Street, in Newport, to make a payment on the automobile; that they then went over to Covington, Kentucky, to the residence of John Preston, and after picking Preston up, they came back to Newport, went over to Cincinnati to buy some newspapers, came back and

then went up and parked the car in the 900 block of Monmouth Street, near the Tropicana Club, on the opposite side of the street.

Now, according to Mr. Strunk, his reason for being in the automobile with these other individuals was that John Sykes had told him that he was waiting for a friend of his who was to pass by that spot in a moving van and that they were going to approach this individual about obtaining a job and that Sykes promised that he would ask about a job for him also; that after waiting several hours, he told Sykes that he wanted to go home and that he did in fact drive him home one time, but later talked him into returning because of the promise of a job; and that after being there for several hours, they were subsequently arrested by the Newport Police Department.

[fol. 194] Q. Did you question him in regard to his other relationships with the other two defendants prior to the time they were arrested?

A. Yes, sir.

Q. What did he tell you?

A. He said that he had been traveling around with his brother-in-law, John Sykes, and had taken several trips with him down to the area of Falmouth, Kentucky, on three or four different occasions, and that the purpose of these trips was to attempt to sell automobiles for this car lot located on Sixth Street in Newport, he didn't recall many of the towns that they passed through, but he did mention Sunrise, Kentucky, Berlin, Kentucky, and of course, Falmouth, and as far as he knew, no automobiles were ever sold on these trips and he didn't know of any contacts made by John Sykes to sell any automobiles. The last such trip he took on the afternoon of January the 17th, 1961, when he and John Sykes—no one else was ever along on these trips—went down to the vicinity of Falmouth, Kentucky, in the '55 Buick.

Q. Did he ever tell you whether or not—did he tell you whether or not Preston was ever associated with the two of them at any time?

[fol. 195] A. The only time he mentioned the presence of Preston being with the other two was on the night that they were arrested or the evening of the night before they

were arrested when they picked up Preston and he was with him at the time they were arrested in Newport, however, he was never along on any of these trips to the Falmouth area, according to Strunk.

Questions by the Court:

Q. Mr. Barry, you have been to Falmouth, have you not?

A. Yes, sir.

Q. And to Berry?

A. Yes, sir.

Q. Now, can you give the jury—Falmouth is the county seat of Pendleton County and Berry is in the northern part of Harrison County, is that correct?

A. I would say that's right, sir.

Q. How close is Berry to Falmouth, the most direct route?

A. When I went down there I passed through Falmouth and continued on down Route 27, I would say six or seven miles, until there is a little cutoff—you could miss the [fol. 196] cutoff to Berry very easily—but there is a road sign that—off to the right, that has the name "Berry" on it and I would say six or seven miles from Falmouth, and then it is several miles, maybe another six or seven back into Berry.

Mr. Meade: Excuse me, Your Honor. I have a witness later who will give us distances and locations.

The Court: All right. Berry is the next town south of Falmouth, is that right?

The Witness: I recall there is another town, Your Honor, that cuts off there, Kelat. That is just a small one.

Q. Did you question whether or not he had ever frequented the Depot Cafe?

A. Yes, sir, I did. He said he had been there on several occasions with John Sykes, that he and Sykes had gone over there to the Depot Cafe on several occasions.

Q. Did you question him regarding the caps that were found in the trunk of the automobile?

A. Not specifically at that time I didn't. We asked him about the guns and the other paraphernalia that was found in the automobile by the police officers. I did not, other [fol. 197] than the guns, specifically ask him about any

single item. He said he had no knowledge of any of that, any of those articles found in the car.

Mr. Meade: You may cross-examine.

Cross-examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. How long have you been with the FBI, Mr. Barry?

A. It will be seven years on October 11th of this year, sir.

Q. During that time how many automobiles have you searched during your investigations?

A. Many of them.

Q. Well, how many, a hundred?

A. Possibly a hundred.

Q. These are the items you found in the trunk?

A. No, they weren't all found in the trunk, no.

Q. In the automobile?

A. In the automobile, yes, sir.

Q. Would you say that these items are unusual to be found in a car—sunglasses?

[fol. 198] A. No.

Q. Cord? Have you ever found these same items in other automobiles?

A. No, sir.

Q. Never have?

A. Those items I found in that '55 Buick.

Q. I mean have you found similar items in other automobiles?

A. Possibly.

Q. And this box that you refer to was empty at the time?

A. Yes, sir.

Q. It could be used for a fishing box, couldn't it?

A. Yes, sir. A fuse box.

Q. Could be used for anything. Now, you interviewed Kenneth Strunk on January the 20th?

A. That's right, sir.

Q. After advising him of his constitutional rights and so forth?

A. Certain of his constitutional rights, yes, sir.

Q. Did you inquire as to his employment, if any?
 [fol. 199] A. I believe I did. At the time he said he was unemployed.

Q. Did he tell you that he was drawing unemployment compensation?

A. I believe he did mention something about that.

Q. Did he mention how much he was drawing per week?

A. I don't recall if he did.

Q. And he said he was a brother-in-law of Sykes?

A. Yes, sir. Sister was married to John Sykes.

Q. Did he state how long he had been in the company of Sykes the two or three months preceding the time you interviewed him?

A. How long or how many times?

Q. How many times?

A. Well, he mentioned starting with he said the week of January the 9th, 1961, he had been with Sykes down in the vicinity of Falmouth, Kentucky, on three or four different occasions in addition to the nights that he and Sykes were together at the Depot Cafe on another several occasions.

[fol. 200] Q. Did he mention that he had been with Sykes, that they were more or less companions as well as brother-in-laws prior to January?

A. I don't—will you repeat that question?

Q. Didn't he admit to you that he and Sykes were frequently in the company of one-another?

A. Yes. They were brother-in-laws, friends.

Q. Yes. Not that they had just began going together since January?

A. I don't believe he said they started going together in January, no.

Q. Now, Strunk told you that together they frequented the Depot Cafe?

A. Yes, sir.

Q. Did he relate anything else to you about the Depot Cafe?

A. He didn't know of any contacts that Sykes had at the Depot, any individual that he knew there, said he tried to sell an automobile, I believe, to a waitress that had previously worked there or was working there.

[fol. 201] Q. Said that Sykes tried to sell the automobile?

A. Yes, sir.

Q. And he said that Sykes was more or less in the business of selling automobiles, isn't that what you testified to before?

A. No. He said he had attempted to sell some automobiles for this dealer on Sixth Street in Newport, on several occasions and had taken automobiles down to the vicinity of Falmouth to attempt to sell them.

Q. At the instance of this Sixth Street dealer?

A. That I don't know, sir.

Q. Did you talk to the dealer on Sixth Street.

A. I did not. No, sir.

Q. Did you verify the ownership of this '55 Buick?

A. I did not. No, sir.

Q. Agent Barry, would you identify the '55 Buick as to color, make and model?

A. Yes, sir. It was a 1955 Buick, two-door, green, Kentucky license 529-545. Do you want the serial number?

[fol. 202] A. No, sir. You say it was green?

A. Yes, sir.

Q. Solid green?

A. I believe it was, yes, sir.

Q. Was it a two-door convertible?

A. No. Two-door sedan.

Q. Two door sedan. Did you check the glove compartment of this car?

A. We checked everything, yes, sir.

Q. Could you tell me what condition the glove compartment was in, particularly the door to the glove compartment?

A. I don't recall any particular condition that it was in, sir.

Q. Do you recall if the lock was jammed or not or jimmied?

A. No, I don't.

Q. You didn't examine that. Did you go in the trunk yourself?

A. Yes, sir.

Q. How did you get into the trunk?

[fol. 203] A. I believe the trunk was open, if I recall.

Q. The trunk was open?

A. Or so it could be lifted up and opened.

Q. Did you observe whether or not the handle had been broken on the trunk?

A. The handle? If it had a handle I didn't observe that it was broken, no, sir.

Q. But at the time you searched the automobile you could just go up to the trunk and lift it open, is that right?

A. I believe that was the condition it was in, yes, sir.

Q. But you didn't check to see if anyone had broken the handle?

A. I don't recall any handle on that model of Buick.

Q. Were you alone at the time you searched this car?

A. No, sir, I was not.

Q. Who was with you?

A. Special Agent Royal L. Blasingame, also assigned to Covington.

[fol. 204] Mr. Elfers: No further questions.

The Court: Stand aside.

BERNARD HEDGES being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. State your name.

A. Bernard Hedges.

Mr. Meade: Mr. Hedges, would you speak up so we can hear you back here and the jury can hear you over here.

Q. Where do you live, Mr. Hedges?

A. Berlin, Kentucky.

Q. Does Berlin have a different name from the post office?

A. We don't have a post office. We are a rural route.

Q. What is the mail address?

A. Foster, Kentucky.

Q. You say you live in Berlin?

A. That's correct.

Q. What size town is Berlin, Kentucky?
[fol. 205] A. Ninety people.

Q. How many?

A. Ninety.

Q. How many business places?

A. Business, three.

Q. What do you do?

A. General merchant.

Q. Are you one of the three business places in Berlin?

A. Yes, sir.

Q. How long have you been a merchant?

A. Twenty-nine years.

Q. Do you know most of the people who live in Berlin, Kentucky?

A. Everyone of them.

Q. I will ask you to look at the three defendants who sit at counsel table to my right and tell us whether or not you have ever seen any one of them before.

A. Yes, sir. One.

Q. Which one did you see?

A. The man, with the plaid shirt.

The Court: would you mind standing please?

[fol. 206] (Reporter's note: The defendant indicated stood.)

The Court: That man?

The Witness: Yes, sir.

The Court: Let the record show that he indicated the defendant Strunk.

Q. Do you remember the location, Mr. Hedges?

A. Yes, sir.

Q. When was this?

A. On or around the 19th—18th of January.

Q. Of what year?

A. '61.

Q. And what was the occasion?

A. To purchase two caps at my store.

Q. That was Mr. Strunk?

A. Yes, sir.

Q. Did you see either one of the other two defendants?

A. No, sir.

Q. I will have the marshal hand you some caps founds in

the Government's Exhibit No. 1 and have you tell the jury [fol. 207] whether or not you have seen any one of the four caps found in the Government's Exhibit No. 1 before.

(Reporter's note: The caps were given to the witness.)

A. Well, this is a hundred per cent wool; not too many handles it, knowing my marking and the price of them and also recalling the sale.

Q. That is one of the caps that you sold to Mr. Strunk?

A. Both of them, the two.

Q. How could you recognize the olive colored cap?

A. Oh, only remembering the sale of it.

The Court: Now, let the reporter identify those two caps and give them a special number, an exhibit number, different exhibit numbers. Mark one X and one Y.

(Reporter's note: A blue cap was marked Government's Exhibit 1X and a khaki cap was marked Government's Exhibit 1Y.)

Q. Would you tell us why you remember this incident?

A. Well when the man came in the store, he turned the [fol. 208] wrong way from where I was, which—that drew my attention, not knowing him and being a stranger, and so immediately I picked him up to wait on him and when I did he said, "Have you a shop cap?" I said, "Yes, I have." So he picks this one up first and tries it for size (indicating blue cap).

Q. You are talking about the blue.

A. Blue, all wool, ball cap. And he lays it down. So then I picks up the shop cap from behind the counter (indicating khaki cap).

Q. The shop cap is the one, the olive colored cap?

A. That is the olive drab, which is more a summer type cap, I had not on display, and he said then, "I will take both of them."

Q. Did you see where he came from?

A. No, sir.

Q. Did you see where he went to when he left the store?

A. No, sir.

Q. Did you ever see him prior to that occasion?

[fol. 209] A. Pardon?

Q. Did you ever see him before that day?

A. No.

Q. Have you ever seen him since that day?

A. No.

Q. Do you know whether or not Mr. Strunk was in an automobile?

A. Almost. After he left the car started from the east side of my store.

Q. Did you see the car?

A. No, sir.

Mr. Meade: You may cross-examine.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Hedgea, is it?

A. Correct, sir.

Q. You are a general merchant there in town?

A. Right.

Q. You have what we popularly term a general store, is that correct?

A. Right.

[fol. 210] Q. How long have you been in business there, sir?

A. Twenty-nine—there?

Q. Yeah.

A. Twenty-two years there.

Q. And before that, how many?

A. Twenty-nine years all told.

Q. Twenty-nine years in all. Now, you say there are 90 people there who reside in the community of Berlin?

A. No, in the city of Berlin.

Q. Well, I call it community or city. And you know every one of those people?

A. Yes.

Q. Now, this general store of yours, it is pretty friendly place, is it not?

A. Yes.

Q. When this defendant, Mr. Strunk, came in, did you happen to have a conversation with him?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. You just—he came in, ordered the caps, paid for them, [fol. 211] turned around and walked out?

A. That's correct.

Q. Mr. Hedges, I will ask you to state whether or not he made a statement to you that he was from down in Stearns, Kentucky?

A. No, sir.

Q. He didn't make any statement like that to you?

A. No, sir.

Q. Did he tell you where he was from?

A. No, sir.

Q. You just sold him the caps and he walked out?

A. That's right, sir.

Q. How long was he in your store, sir?

A. Well, I would say a maximum of five minutes.

Q. About five minutes. And then when he left, why, you heard a car start up and that is all you know about it?

A. The east side, yes, sir.

Q. Mr. Hedges, I will ask you when you first related this [fol. 212] incident to this case here.

A. The jury?

Q. Please?

A. The jury you mean?

Q. Tell us when you first—this incident was first called to your attention as part of this conspiracy case.

A. Dates is bad. I am going to say one week later.

Q. And at that time an FBI man called on you, is that correct?

A. Right.

Q. And he discussed with you the visit of this defendant to your store?

A. Nothing but asked me if I recalled seeing these two caps, which I did.

Q. Now, did these two caps fit this man who purchased them?

A. He said they did.

Q. Did he try them on in your presence?

A. He tried them on in my presence. I didn't see him, see the fit. He said they did and, "I will take them."

[fol. 213] Q. Now, you stated that he asked for a shop cap when he first came in.

A. Shop cap.

Q. And that is what we refer to as a shop cap (indicating khaki cap)?

A. That is a shop cap.

Q. Now, this was on the counter, is that right (indicating blue cap)?

A. Correct. Right.

Q. Did you have to use any salesmanship to persuade him to buy this cap in addition to this one?

A. No, none at all.

Q. Please?

A. He bought both of them.

Q. He just ordered the shop cap, picked up the other one and said, "I will take both of these," and left?

A. That's right.

Q. And that is the limit of your knowledge concerning this case, is that right?

A. That's right.

Mr. Leggett: Thank you, sir.

Mr. Meade: One further question.

[fol. 214] Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Do you know where the community of Berry, Kentucky, is?

A. No, sir. I don't believe I could direct you to it.

Q. Then you wouldn't know how far Berry is, how many miles Berry is from Berlin?

A. No, sir, I would not.

Mr. Meade: All right, sir.

The Court: What county is Berlin in?

The Witness: Bracken County.

The Court: That adjoins Harrison County?

The Witness: No, sir.

The Court: Does not adjoin?

The Witness: No, sir. It joins Pendleton, Robertson and Mason.

The Court: All right.

The Witness: May I be excused, sir?

The Court: Are you through with this witness?

[fol. 215] Mr. Meade: Yes.

Mr. Leggett: We have no objection.

Mr. Meade: This witness may be finally excused.

• • • • •
* OFFER IN EVIDENCE

Mr. Meade: If Your Honor please, I would like to have the box and its contents introduced as the Government's Exhibit No. 6.

The Court: Very well. Let it be.

[fol. 216] Mr. Leggett: If the Court please, I would like to reserve my objection.

The Court: Very well.

ELMER JOYCE, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Your name is Elmer Joyce?

A. That's right.

Q. Where do you live, Mr. Joyce?

A. 413½ Madison Avenue, Covington.

Q. What is your business?

A. Operate a gun shop.

Q. Where is your gun shop located?

A. 402 Madison Avenue, Covington.

Q. How long have you operated this gun shop?

A. Eight years and eight months.

Q. Does the establishment have a business name?

A. Elmer Joyce Gun Shop.

Q. You deal in all types of guns?

[fol. 217] A. All types.

Q. Is that new and used?

A. New and used guns.

Q. Mr. Joyce, I will have you take a look at the three defendants sitting at counsel table to my right and ask you to say whether or not you have seen either one of these three individuals before.

A. One that I remember definitely.

Q. Which one is that, sir.

A. The first one on the left, on my left, on your right.

(Reporter's note: The defendant indicated by the witness stood.)

Q. Is that the fellow in the brown suit, Mr. Sykes, you are talking about?

A. Sykes.

Q. When did you see Mr. Sykes?

A. On December the 10th, 1960.

Q. Was there anyone else with Mr. Sykes at the time?

A. There was someone, but I couldn't definitely say who.

Q. Did you ever see any of the other defendants on any occasion?

[fol. 218] A. I wouldn't say truthfully. No, I could not say. Possible, but not truthfully.

Q. Which one is it possible?

A. Possible? (Pausing and looking toward defendants). Well, I know definitely the boy on the left, the gentleman on the left.

Q. All right, sir. And what was the occasion? Was it at your store?

A. Pardon?

Q. Was it at your store or your home?

A. At my store.

Q. All right, sir. Go ahead and tell us about it.

A. Came in the store and purchased a .38 special caliber Colt revolver, two and a half inch, nickel-plated, serial No. 683178, on December the 10th, 1960; \$39.95, plus \$1.20 tax. Gave the name of John R. Sykes, male, white, 26, five foot, nine, 180 pounds, 114 Peter Knoll Homes, Newport, Kentucky.

Q. I will have the marshal hand you the Government's Exhibit No. 2. I will ask you to examine this gun and tell us whether or not it is the same gun that you sold to Mr. Sykes.

[fol. 219] (Reporter's note: The marshal handed the exhibit to the witness.)

A. That is the same one.

Q. Does it have the same serial number?

A. The same. The serial number on the Colt is inclosed inside the frame. Any other number that may be on here would be an issue number.

Q. Have you checked?

A. I have checked.

Q. To verify have you compared the numbers on there with the numbers on your record?

A. I have checked, yes.

Mr. Meade: You may examine.

Cross examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Joyce, I believe you testified that you sold this particular hand weapon here to the defendant Sykes, on December the 10th—

A. That's right.

Q. (continuing)—of 1960.

A. 1960.

Q. Now, did you make a record of this sale for your books?

[fol. 220] A. I did.

Q. Did you bring that record with you?

A. (Hands document to counsel.)

Q. Now, Mr. Joyce, if Mr. Sykes had traded in a weapon to you at the time he purchased this, would that appear on this card?

A. No, not on that card, no.

Q. I will ask you to state whether or not you specifically remember this transaction?

A. I remember it according to my books, yes.

Q. I will ask you to state what type of gun Mr. Sykes traded to you with this transaction?

A. I don't remember definitely any one.

Q. You do recall him trading in a weapon?

A. No, I don't.

Q. Do you recall receiving a .25 caliber pistol at the time of this transaction?

A. No.

Q. I will ask you to state whether or not the records of your shop would disclose when you take a gun in on trade. [fol. 221] A. That's right. That's right.

Q. I will ask you to state whether or not you could at this time check those records and ascertain whether or not you did in fact receive a .25 caliber pistol in trade on this particular hand weapon.

A. I would have to check the other side of my page, the trade on the other side of my page.

Q. Did you bring that book with you?

A. No, I didn't bring that one with me.

Q. Now, I notice that this serial number on this card has been copied over the typing in ink.

A. The typing—the typewriter is bad. That is why I just marked it over.

Q. When did you mark over that?

A. About—when I made a record out for the gentleman who investigated it.

Q. When you made the record out for the gentleman?

A. The Federal Bureau came down, yes. I typed it out [fol. 222] and it wasn't plain enough.

Q. Did you make this card up for the FBI?

A. No, for my information so I had it readily available, when my books are in for income tax. That is a memo.

Mr. Leggett: May it please the Court, I would like to request the witness be required to produce the original ledger which he has testified to.

The Court: Do you have that available?

The Witness: I can have it in about 15 minutes.

The Court: All right. He can bring it back here after he finishes testifying.

Are you through with this witness?

Q. Have you ever had any other dealings with the defendant, Mr. Sykes?

A. Definitely I wouldn't know. I have seen him several times.

Q. He has been in your store?

A. Yes.

Q. On numerous occasions?

A. Yes.

[fols. 223-224] Mr. Leggett: I have no further questions, Your Honor.

The Court: Can you get that record and bring it here, sir?

The Witness: I will go immediately. Yes, sir.

The Court: Do you want to make that a part of the record, his notes?

Mr. Meade: It is my understanding that they are required to keep those records is why I didn't.

[fol. 225] VINCENT STRICKLEN being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Tell the jury your name.

A. Vincent Stricklen.

Q. Where do you live?

A. 18 Meadow Lane, Fort Thomas, Kentucky.

Q. What do you do, sir?

A. I operate a used car lot on the Sixth Street fill that [fol. 226] is located between Newport and Bellevue, in Campbell County.

Q. What is the name of that?

A. The name is the same as the address, Sixth Street Fill Auto Sales.

Q. Mr. Stricklen, do you know the three defendants who sit at counsel table?

A. I have seen all three of them.

Q. Where did you see these three individuals?

A. I have seen them all on my car lot at one time or another. John Sykes I have seen all the way since approximately a year ago now. He has bought approximately four cars from me in that length of time.

Q. Mr. Sykes has?

A. Yes.

Q. And Mr. Sykes is which one of the—

A. The man in the brown suit.

Q. Did you ever see the three at your lot at one time?

A. Not all three at one time, two but not three.

Q. What two did you see at your lot?

[fol. 227] A. The man in the red shirt and Mr. Sykes.

Q. Mr. Preston and Mr. Sykes?

A. Yes, sir.

Q. Did you know the man as Mr. Preston?

A. Yes, sir.

Q. Did you ever see Mr. Strunk and Mr. Sykes there together?

A. Yes, they were there together at other times.

Q. Did Mr. Sykes ever sell any automobiles for you?

A. He has—the sales were never completed. He did try to sell some cars.

Q. When was that?

A. That was when he was out of work from the furnace company and that was starting around the first of the year.

Q. The first of 1961?

A. January 1961, yes, sir.

Q. Did he work on your lot?

A. No. He would take a car and try and peddle it in town. He would drive it for the day.

[fol. 228] Q. That was just in town?

A. Yes. Yes.

Q. Could he have gone any other place, other than in town?

A. May I answer that in my own way?

Q. Yes, sir. Go ahead.

A. He could. He did one time take a car out of the county. By that I mean he asked permission to take a car to Lexington one day, which I gave him permission to do.

Q. Would you just tell the jury in your own words, explain that particular occasion?

A. O. K. Approximately on a Tuesday, Mr. Sykes came in—

Q. Tuesday?

A. On January the 16th

Q. All right. Go ahead.

A. He came in and he had Mr. Preston with him and Mr. Preston was going to buy a 1956 Chevrolet, turquoise and white, and he had to go down to Lexington to an attorney, as having an injury from a railroad.

[fol. 229] Q. Had to go to Lexington to see his attorney for what?

A. Sir?

Q. Had to go to Lexington to see an attorney for what reason?

A. He had an injury to his leg, he had a settlement coming from the railroad company and as soon as he got the settlement he wanted to buy that car.

Q. Did he say what railroad company?

A. I paid no attention to that, sir, if he did. I could not tell you.

Q. All right. Go ahead.

A. And asked if they could use a Buick to drive down the next day and would return it on Wednesday to me.

Q. What type of Buick was it?

A. It was a hard top, '55, green Buick—grayish green color. Then I told them, I says possibly they could take it down, I did not see how they could bring it back on a Wednesday if they had to see the attorney; if he was going to be in court or something, there might be a delay, that I wouldn't expect the car back until Thursday morning.

[fol. 230] Q. Which would be what date?

A. Well, 16th, 17th, 18th and the 18th they did return the car back to me. That was the only time that I had known of a car being taken out of the county, that they had of mine.

Q. Did they purchase that Buick from you?

A. That car was purchased on Thursday night by John Sykes and registered in the name of his wife, Elizabeth Lou.

Q. Do you have the title or information which would indicate that?

A. Yes, sir, I do.

Q. Does that show the serial number of the '55 Buick?

A. Yes, it does.

Q. What is that serial number?

A. 4B1100153.

Q. Does it show the license?

A. The license number was a Kenton County license number, 529-545.

Q. And what date was that that the automobile was purchased?

[fol. 231] A. That car was purchased on the 18th of January, 1961, at approximately 8 o'clock in the evening.

Q. Did Mr. Preston purchase the automobile which he had told you he was going to purchase?

A. No, he did not.

Q. Did Mr. Sykes pay you for that automobile?

A. Mr. Sykes paid me \$150 in cash and I took a note for \$191.25.

Q. Did Mr. Sykes fill out a credit application with you?

A. He signed a chattel mortgage for it.

Q. Did you check to determine whether or not he was employed?

A. He had owed me on another car, —

Q. Had owed —

A. (continuing) — at that time and I knew he was out of work because he was still paying me so much a week on the car, from his unemployment check.

Q. Did Mr. Preston tell you whether or not he had made a settlement with the railroad company?

[fol. 232] A. It was delayed is all they said. They never said they made a settlement. There were some more papers or something else that they had to fill in. It was delayed they always said.

Q. Did you later repossess this automobile?

A. I did take it back on my lot. I did not go through the repossession proceedings because Elizabeth Lou Sykes came up and signed a bill of sale back to me on the car and the \$150, that deposit, was credited to the other car which they owed me, which made them a clear title to that car.

Q. Have you since — where did you secure the '55 Buick?

A. I bought it from Schott Ford, in Newport.

Q. From where?

A. Schott.

Q. I mean after you had sold it to Mr. Sykes, when was the next time and where was the place that you saw it after that?

A. Oh, Newport Police headquarters. Then I found—I took it off of Fenders lot where the Newport police had [fol. 233] it towed.

Q. Did the police release the automobile to you?

A. The Newport police released the car to me.

Q. Have you since sold the '55 Buick?

A. Since then I have sold the car to a Bobby Fuller in Brent, Kentucky.

The Court: Where did you say your used car lot is?

The Witness: On Sixth Street Fill, between Newport and Bellevue, a continuation of Sixth Street out of Newport.

Q. What date was it you say they returned the Buick?

A. The 18th, on a Thursday.

Q. And who was with Mr. Sykes when he returned the Buick?

A. He was alone. It was around 9, 10 o'clock in the morning, I would gather.

Q. Did you see either one of the three individuals after that time?

A. I seen Mr. Sykes on the—around noontime on the [fol. 234] 19th, in the Newport police headquarters.

Mr. Meade: You may cross-examine.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Stricklen, I didn't quite get that straight. You said that Mr. Sykes returned that automobile to you on the 18th.

A. On the 18th.

Q. And it was about 9 or 10 o'clock in the morning.

A. That's right.

Q. Now, you have had several business dealings with Mr. Sykes over a period of time, haven't you?

A. That's right.

Q. You sold him about four cars in the last year?

A. Approximately.

Q. What was the next to the last car you sold him?

A. A Plymouth.

Q. Plymouth. And what was the balance that he owed you on that?

[fol. 235] A. He owed me \$130.

Q. \$130. What year Plymouth was that?

A. Around a '55.

Q. 1955 Plymouth. Now, you stated that he had been paying you out of his unemployment check?

A. Yes.

Q. I will ask you to state whether or not you made a proposition to him with respect to selling automobiles or attempting to sell them?

A. Yes, I offered him a standing commission of 25% of the gross.

Q. Twenty-five per cent of the gross?

A. That's right.

Q. You mean of the gross profit?

A. Gross profit.

Q. When did you make this offer to him?

A. That was after he had become unemployed from the—

Q. Furnace—

A. (continuing)—furnace company that he was working [fol. 236] for and knowing he was doing nothing, that he possibly could pick up a little money on the side, help pay off the car, help me also at the same time.

Q. Did he hang around the lot pretty closely there for a few days just to learn?

A. For a few days, but then I told him there was no use being on the lot because he wouldn't get as many sales there as he would out scouting out business.

Q. You have some pretty powerful salesmen working for you on the lot?

A. No. We have one.

Q. You have one and, of course, you work the lot yourself?

A. That's right.

Q. How many years experience do you have in the business?

A. I have approximately two years in that business.

Q. Now, I notice you stated you sold him this '55 Buick, on the evening of January the 18th, is that correct?

A. That's right.

Q. About what time was that?

[fol. 237] A. About 8 p.m.

Q. About 8 p.m. And he paid you \$150 in cash?

A. That's right.

Q. And you took a note for \$191.25?

A. \$191.25.

Q. That makes a total sale price somewhere around 341?

A. \$325 cash price, \$9.75 for sales tax and \$7.00 for transfer.

Q. Now, for a '55 Buick that strikes me as being almost a wholesale price, isn't it, sir?

A. Well, he was supposed to have sold that car to a man whom I had never seen. Supposed to have been down at the Midwestern Bar or some place.

Q. In other words, he had a deal?

A. He had a deal, working, and I said I could not sell a car to a party who I had never seen, nor sign any papers, but I would sell him the car that he is supposed to have sold for \$395. I said, "I will make you a sale for three and a [fol. 238] quarter, when you get the last payment on it, that is yours, and what you sold it for I couldn't help." That is how the car was registered, in his name.

Q. Now, I will ask you to state to the Court and jury where that automobile was on the day of the 18th.

A. At 8 p.m. it was on my lot; at 8:05, approximately, John Sykes had it in his possession.

Q. It was on your lot at all times between 9 and 10 a.m., when he returned it to you, and 8 p.m., that evening?

A. I would not say that one way or the other because I know he was trying to sell the car at the time. He—it could have been there or he could have been using it that day. I don't know.

Q. But you do recall—

A. He did bring it back, but if he took it back out again to show somebody, I wouldn't want to say one way or the other.

Q. You just don't recall?

A. I don't recall.

Q. You don't recall his taking it away? You do definitely recall his returning it that morning?

[fol. 239] A. That's right.

Q. You do further recall him purchasing it that evening?

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A. Because he told me that he thought he had somebody that was interested in a car and that if—

Q. Did you have occasion to examine the condition of that automobile before you turned it over to him on the 17th?

A. Such as what kind of condition do you mean?

Q. Was there any body damage to it?

A. Yes. There was a body damage to it. Had a fender—I would say it was a left fender, I wouldn't want to be positive—I would say left or right, but I am pretty sure it was a left fender that had approximately \$90 worth of body damage on it. That was one reason the car was being sold at the price it was. The fender had to be straightened, plus the chrome work in the rear.

Q. Now, do you recall whether or not the trunk could be opened on this automobile?

A. There was a key for the trunk. The key worked hard. [fol. 240] You could work, open it sometimes, and other times you couldn't.

Q. Was the trunk door hard to open as a result of this damage to the rear of the automobile?

A. No. Just the lock that was hard to turn.

Q. Did you have occasion to examine this automobile at the time that it was surrendered to you at the Fender's Garage?

A. Yes.

Q. I will ask you to state whether you noticed any additional damage to the automobile.

A. There was no additional damage of any kind.

Q. Did you examine the glove compartment?

A. There was nothing in it.

Q. Did you observe as to whether or not the glove compartment had been forced open?

A. I could see no signs of any forcing, either on the glove compartment or on the trunk.

Q. You could see no signs of forcing anywhere on the [fol. 241] automobile?

A. No.

Q. What color is this Buick automobile, Mr. Stricklen?

A. Greenish-gray.

Q. Greenish-gray. That is a solid color?

A. I believe most of all those hard-tops are two tone.

Q. Do you recall?

A. I couldn't recall right offhand.

Q. You do not recall. Mr. Stricklen, did you know the area which Mr. Sykes was working in an attempt to sell these automobiles?

A. Campbell and Hamilton County, I would say was—

Q. Did you have any conversations with him concerning his experience in the selling game here in Northern Kentucky?

A. Well, I knew he was a salesman for furnaces and direct selling to consumers.

Q. Did he mention to you that he had been engaged in sales of sewing machines throughout Northern Kentucky? [fol. 242] A. At one time, yes.

Q. And did he also discuss with you the fact that the territory he covered extended up towards Maysville and down into Falmouth?

A. He did tell me that he did sell for some sewing machine through that area.

Q. And did he discuss with you the possibility of his working the same area and selling cars for you?

A. He did not discuss anything for taking a car that far.

Q. He didn't say what area he was going to cover?

A. He did not, but it was assumed that he would just be in Campbell and let's even narrow it down closer than that, Newport, Covington, Cincinnati.

Q. That is what you assumed, is that correct?

A. Yes.

Mr. Leggett: Thank you, sir. I have no further questions.

Mr. Meade: One further question.

[fol. 243] Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. I just want to get the dates correct in my mind. You say the date that they went to Lexington was what date?

A. The 17th of January, on a Wednesday.

Q. And who was present at that time?

A. That—they took—

Q. One or two or all three?

A. Mr. Sykes took the car on the evening of the 16th,

because if he was to get to Lexington at the time he wanted to go there, my lot—my lot would still have been closed when he wanted to leave. So, who had the car on the 17th or who was with him on the 17th, I would have no way of knowing.

Q. You say he took the car on the 16th?

A. He took the car on the evening of the 16th. That was the last I seen of that car until the 18th.

Q. Was there anyone else with him at the time on the evening of the 16th there?

[fol. 244] No.

Q. Then, what date was the automobile returned?

A. The 18th, in the morning.

Q. What date was it then that you sold the automobile to Mr. Sykes?

A. That evening.

Q. That evening. Does your bill of sale reflect that?

A. Yes, sir.

Q. Would you refer to it and check to make sure.

A. The bill—the order is dated the 18th. The mortgage which was filed in the courthouse, which you cannot do until the next day, has a time stamp on it of 10 a.m. on the 20th, which—

Q. But the order was dated—

A. The order and the paper work would have had to have been done the night before.

Q. On the 18th?

A. The 19th.

Q. Then you actually sold the automobile on the 19th?

A. On the 19th, yes, sir.

[fol. 245] Mr. Meade: All right, sir.

Questions by the Court:

Q. Did you say that Mr. Sykes had a Plymouth that he had bought from you?

A. Yes, sir.

Q. When had he bought that?

A. He bought that approximately—I would say about July of '60.

Q. What—do you know what color it was? Do you recall whether solid or two-tone? If you don't know—

A. I—to be truthful, I don't know.

The Court: Stand aside.

Recross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. I am still a little bit vague after this last series of questions, Mr. Stricklen. Now, you delivered the automobile to Mr. Sykes on the evening of the 18th, is that correct? Look at your car order.

A. It is the evening of the 19th. Pardon me. That is my mistake. Actually, it was the date between Tuesday, Wednesday, Thursday and Friday.

[fol. 246] Q. I am still—

A. Tuesday was when he borrowed the car. Wednesday is when he was to take it to Lexington. Thursday he returned it. Thursday night I sold it to him. Friday morning I recorded the mortgage in the courthouse. I mean, put a calendar in front of me and I will give you the dates and keep them straight.

Q. May I see the car order, Mr. Stricklen?

A. Sure. That is—there is your date in there (handing document to counsel).

Q. Now, looking at the calendar, will you please tell us the date that he borrowed—

A. I am one day off is all. He borrowed the car on the 17th, on Tuesday evening. He used the car on the 18th. He came—he returned the car on the 19th, which is a Thursday, in the morning. The 19th in the evening is when he bought the car; the 20th is a Friday, which I recorded the chattel mortgage on the car. I am sorry I mixed those dates up. The days of the week I was more clear on than I was on the dates.

Q. Now, do you have the bill of sale there?

A. Yes, I have. You will notice that bill of sale is notarized [fol. 247] on the 19th.

Q. Then you made this bill of sale out on the evening of the 19th?

A. That's right.

Q. Is that correct?

A. The day he bought the car.

Q. And you made the bill of sale, this car order, out on the 19th in the evening?

A. That's right. Also the chattel mortgage was made out on the 19th.

Q. May I see the chattel mortgage?

A. (Hands document to counsel)

Q. Mrs. Sykes was not present at the time that this sale was consummated?

A. No, she was not.

Mr. Leggett: No further questions.

Mr. Meade: This witness may be finally excused unless the defendant—

The Court: You may be finally excused, Mr. Stricklen.

The Witness: Thank you, sir.

[fol. 248] ARTHUR M. ALLISON, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Tell the jury your full name.

A. Arthur M. Allison.

Q. Where do you live, Mr. Allison?

A. La Grange, Kentucky.

Q. What is your job?

A. I am currently employed at the Kentucky State Reformatory as a chief records clerk in charge of inmate records.

Q. And that is at La Grange?

A. That's correct.

Q. Do you have some records in your possession at the

present time for the year 1960, as concerns a person by the name of Chester Clark?

A. That is correct.

Q. Would you refer to those records and tell us the period of confinement of Mr. Clark?

[fol. 249] Mr. Leggett: If the Court please, we would like permission to approach the bench at this time.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Leggett: If the Court please, I don't know the nature of the testimony of this witness but I want you to record an objection to this testimony since it relates to a defendant who is not before this court at this time. He has never been apprehended and he is not presently before the court.

The Court: I don't know what he is going to ask him.

Mr. Leggett: I don't know either. I am at a loss to know why they are offering testimony and I can't see that it relates to the guilt or innocence of these persons.

Mr. Elfers: This man is not a competent witness in this case against these three named defendants.

The Court: I don't know what he is going to ask him.

Mr. Meade: Mr. Clark is a defendant and has been charged in the conspiracy, took part in the conspiracy, and his part [fol. 250] of the conspiracy is relevant to the whole case. We intend to show by this witness that Mr. Clark was confined in prison at La Grange, Kentucky, that he was released approximately November of 1960, that at La Grange, Kentucky, automobile licenses are produced and an automobile license was found in this defendant's possession.

The Court: You want to show that automobile licenses are produced in La Grange in the prison?

Mr. Meade: Yes, sir.

The Court: And that Clark was an inmate?

Mr. Meade: And that Mr. Clark was an inmate, that this same automobile license was found in the possession of these defendants which was fictitious and we will—

The Court: I will overrule the objection. He may testify to that.

(Thereupon The Colloquy at the Bench Ended)

Q. Have you referred to your records, Mr. Allison?

A. Yes, I have.

Q. Would you speak up just a little louder, sir.

[fol. 251] A. All right, sir. Chester L. Clark was admitted to the Kentucky State Reformatory May the 11th of 1959, from Carroll County. He was discharged November the 11th of '60.

Q. That was exactly—

A. Eighteen months.

Q. Do your records indicate the type of work that Mr. Clark did while confined at La Grange?

A. Yes, it does.

Q. And what type of work does it indicate that Mr. Clark did?

A. He was assigned to the kitchen as a kettle cook.

Q. As a what?

A. Kettle cook.

Q. And was that during the entire period of time in which he was confined?

A. Yes, it was.

Q. I will ask you this, are the automobile licenses used in the State of Kentucky made at La Grange?

A. That's correct.

Q. Are they made at any other place?

[fol. 252] A. No, sir.

Mr. Meade: You may cross-examine.

Cross-Examination

By Mr. Robert Leggett, Counsel for the Defendants:

Q. You stated that this Chester Clark was an inmate there at La Grange between May the 11th 1959 and November 11th, 1960?

A. Chester L. Clark, yes, sir.

Q. And as such inmate he was assigned to the kitchen, is that correct?

A. That is correct.

Q. Do you know where Chester L. Clark is now?

A. Not to my knowledge.

Q. Do you know where he went following November the 11th, 1960?

A. Just one moment please (looking at records). He was to make his home with his son, Leslie Clark, in Cincinnati, Ohio.

Q. You don't know where he went, though? That is where he was supposed to go, is that correct?

A. That's correct.

[fol. 253] Mr. Leggett: No further questions.

The Court: Do your records indicate his age?

The Witness: Yes, sir.

The Court: How old was he?

The Witness: At the time of the admission?

The Court: Yes.

The Witness: He was 52.

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Do your records also indicate why he was confined?

Mr. Leggett: I object.

The Court: Objection sustained.

Mr. Meade: That is all.

The Court: Stand aside.

Mr. Meade: Your Honor, if the defense has no objection, we would like to finally release this witness.

The Court: Yes, sir. You may be finally excused, sir.

Call your next witness.

[fol. 254] SCOTT POE, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. What is your name?

A. Scott Poe.

Q. Where do you live?

A. Maysville, Kentucky.

Q. And what is the type of work that you do?

A. County court clerk, Mason County.

Q. As county court clerk, is it one of your jobs to issue automobile licenses?

A. Yes, sir.

Q. Do you have any type of records which would indicate the series, the number series that are issued to Mason County, Kentucky?

A. I have.

Q. Do you have that record with you at the present time?

A. I do.

[fol. 255] Q. Would you refer to that record and tell us what that record is called.

A. Requisition for motor vehicle registration and useage tax supplies.

Q. Does that record indicate the series that would be issued for Mason County, Kentucky?

A. It does.

Q. And what series is that, sir?

A. It starts at 683001 to 688900.

Q. What was the last one?

A. 688900.

Q. For what year?

A. 1961.

Q. 1961?

A. Uh-huh.

Q. Would you have the marshal hand you a license plate found within the container, Government Exhibit No. 1—

The Court: Give this Exhibit No. 1Z. The others, the caps, were X and Y, make this Z.

(Reporters's note: The license plate was marked Government Exhibit 1Z.)

[fol. 256] Q. Based on your records, Mr. Poe, and based on your knowledge of license plates, by virtue of your job, is this an actual license plate which would be issued for Mason County, Kentucky?

A. It is not.

Q. And why isn't it?

A. The numbers are wrong.

Q. You have no 800 series for Mason County, Kentucky?

A. No, we don't.

The Court: That is a 1961 plate, or on its face appears to be a 1961 plate, for Mason County?

The Witness: Yes, it is made like the rest. This is right up here and that here, but that number is wrong. It is not a Mason County tag.

The Court: You can say positively you did not issue that?

The Witness: No, I did not issue that plate.

The Court: Did you ever issue anything higher than the 600 series?

The Witness: No, we run the same thing for the last four years. About four years ago they did jump up from 66, I believe they was, then they jumped them up to, but we have [fol. 257] had the same several years, for the last four years I would say, but we have never had a number like that.

Q. Do you know for what county the 800 series are issued, if they are?

A. No, I do not.

Q. But they are not issued for Mason?

A. No.

Mr. Meade: All right. You may cross-examine.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. What is your name, sir, please? I couldn't quite hear.

A. Scott Poe.

Q. Bowles?

A. Poe—P-o-e.

Q. Mr. Poe, may I see this plate a minute?

A. (Hands plate to counsel)

Q. I will ask you to state whether or not you personally examine every license plate that you receive from the La [fol. 258] Grange penitentiary?

A. We have to report them as they are. If they are wrong and if one is wrong, you would catch it the first report you made.

Q. Have you had any occasion to have a plate mistake, a plate improperly made or anything of that nature?

A. I have.

Q. And in what way was it improperly made?

A. They were made upside down. The number was right but put on wrong.

Q. Have you ever received a plate with the wrong number on it?

A. No.

Q. Have you ever received a plate with the wrong county on it?

A. I have not.

Q. How long have you been the county court clerk?

A. Sixteen years.

Q. And in that 16-year period of time, you have not received any mistakes?

A. I have not.

[fol. 259] Q. Now, you stated that you do not know what area this 824-101—

A. I do not know if they go that high. Now, I don't know if they go that high or not. I have a sheet in my office. I could tell you but I don't have it with me.

Q. It is one issued by the department—

A. (continuing) The man ahead of me should have been able to tell you what county that is, that number, if they go that high.

Q. You do not know other than the fact that this number does not agree with the work sheet which you have for Mason County?

A. No.

Q. This is a plate which is regular on its face, is that correct?

A. It is all right except that number and the number is wrong for Mason County.

Mr. Leggett: I have no farther questions.

Mr. Meade: That is all, sir.

The Court: Those series are collected alphabetically, aren't they? In other words, by county?

[fol. 260] The Witness: By the county.

The Court: That would be a county that was beginning

with a letter much lower, much farther on in the alphabet than M?

The Witness: Your Honor, they start out with A.

The Court: And it is purely alphabetical?

The Witness: Right.

The Court: That is all.

Mr. Meade: This witness also may be finally excused.

The Court: You may be finally excused, Mr. Poe.

ELMER JOYCE, a witness for the plaintiff, was recalled, and having previously been sworn, testified further as follows:

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

The Court: Proceed with your examination. You wanted to ask him about his records.

Q. Mr. Joyce, I will ask you to state whether or not you [fol. 261] have brought with you your records for December 1960?

A. I have.

Q. I am going to direct your attention to that page in your records where that transaction appears, of the sale of a .38 caliber hand weapon to Mr. Sykes and I will ask you to state whether or not that record discloses any trade-in of a weapon made at that time.

A. No trade-in. Maybe I can explain this to you.

Q. Explain it to the jury.

Mr. Meade: Will you speak up a little louder.

A. My sales are down here, any taking in as money paid out is here; any money paid out on my daily receipts is here and classed as stock. There is no trade-in.

Q. Then if you took a weapon on trade-in, would you write that weapon down here?

A. It would be in here.

Q. Mr. Joyce, on the front of this sheet I see this entry

which describes—I assume this is the entry describing the [fol. 262] sale, is that right?

A. Yes.

Q. And the sale price is \$39.95?

A. \$39.95. That's right.

Q. Now, I am going to direct your attention to the other side of this sheet under December the 10th and I am going to ask you where that sale appears.

A. Right there (indicating). Daily sales, of December the 10th, right there.

Q. This item 39—

A. 95, yes.

Q. Did you take any weapons in, in trade, on December the 10th?

A. Yes, I took one, but it was a .22 Ruger 6, from a man named Vinsky, from Cincinnati.

Q. Is there any statement on there which would show that you took in a Spanish-made .25 caliber weapon?

A. None. None whatsoever.

Q. Will you look at your sheet, next following this one, and see if there is any entry made on it?

A. Each day's pistol sales in and out records are carried [fol. 263] on the back of my weekly sheet.

Q. December the 10th was the last day of the week?

A. December the 10th was the last day.

Q. There is nothing in your record that discloses that .25 caliber?

A. Nothing.

Mr. Leggett: I thank you, sir.

The Court: You may be finally excused, Mr. Joyce.

Call your next witness.

ARTHUR E. DAVIDSON, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Your name is—

A. Arthur E. Davidson.

Q. Where do you live, Mr. Davidson?

A. 3157 Birch Drive, Erlanger.

Q. What do you do, sir?

[fol. 264] A. I am a special agent with the FBI,

Q. Stationed in—

A. Covington.

Q. How long have you been a special agent for the FBI?

A. Approximately seven years.

Q. Did you participate in the investigation of this matter which is on trial here today?

A. Yes, I did.

Q. What was the extent of your participation?

A. I interviewed Preston.

Q. Which one of the defendants?

A. The one in the maroon shirt.

Q. That is the one in the center?

A. Yes, sir.

Q. On what date did you interview Mr. Preston?

A. On January the 20th, 1960.

Q. And where was this interview?

A. In the juvenile office, at Newport, Kentucky, police headquarters.

[fol. 265] Q. Was this January of—

A. 1961.

Q. —'61? Was there anyone else present at the time you interviewed Mr. Preston?

A. Yes, sir.

Q. Who was present?

A. Special Agent Robert L. Brooks.

Q. Were either of the other defendants present at that time?

A. No, sir.

Q. Did Mr. Preston furnish to you a signed statement?

A. No, he did not.

Q. Did you ask him questions regarding this matter on trial here today?

A. Yes, but before we did, we identified ourselves to him by our credentials as special agents of the FBI and advised him that he did not have to talk to us if he did not wish to, that he was entitled to the rights of an attorney, and that anything he said, if he decided to talk to us, could be used in a court of law.

Q. Would you tell us what was said during the course of the interview?

[fol. 266] A. Mr. Preston advised that on the evening of January 19th, 1961, he was at his home at 229 Riverside Drive, in Covington, when he received a phone call from Mr. Sykes asking him if he would like to go and get some sandwiches. Approximately 8:30 or thereabouts, Sykes picked Mr. Preston up at his home and in the car at the time was a man known only to Preston as "Red". They went to the White Castle at 12th and Madison, had sandwiches, and from there went to Cincinnati, where they were looking for a man that had evidently had an accident with Sykes' car and not finding him they returned to Newport. He stated it was somewhere in the vicinity of midnight on that evening. Said that Ray or "Red" and Sykes had planned to meet a man over there, some sort of a truckdriver, that they thought they could get a job with. They parked the car in front of the Tropicana, which was formerly the Glenn Rendezvous, inasmuch as they thought this truckdriver, whom neither of them knew the name according to Preston, they thought he frequented the Mecca Cafe, which is located handy to the Tropicana. Said that he had met Sykes approximately two weeks prior to that time in early January at the Depot Cafe, in Covington. Their acquaintance came about as a result of Preston's being an accomplished harmonica player and evidently Sykes enjoyed that type [fol. 267] music. Preston said that he had on that evening they were in the car, he had noticed a gun in the glove compartment of the car, but thought nothing of it as approximately three or four days prior to that time he had heard at the Depot Cafe that Mr. Sykes was a constable.

Mr. Preston was asked if he had any knowledge of what

was contained in the trunk of the car belonging to Mr. Sykes and he said he had no knowledge whatsoever, that nobody had told him what was in the trunk nor did he see anything in the trunk. When asked if he had any knowledge of any conversations concerning any bank robberies, or contemplated bank robberies, he stated that he had never heard anybody at the Depot Cafe discussing any contemplated bank robberies, nor on the night that he was with this Ray and Sykes, the night of the 19th, did he hear any talk concerning any contemplated bank robberies. He also stated that he had never taken any long rides with Mr. Sykes, that is, down in the Falmouth, Kentucky, or Cynthiana or Maysville area.

Q. Did he mention the defendant Strunk to you at all?

A. No, sir. He did not. He stated that in the car that night was John Sykes and a man he knew only as Ray.

[fol. 268] Q. Was there any further conversation with Mr. Preston on that occasion that you can remember?

A. I believe we asked him if he knew of the existence of any caps or silk stockings being in the trunk of the car at the time and he said he did not.

Mr. Meade: All right, sir; you may cross-examine.

The Court: Members of the jury, this witness has testified as to a conversation which he had with the defendant Preston. He has testified to certain statements which Preston made to him. This was not in the presence of either of the other defendants and you are expressly charged that you shall not consider these statements of Preston as affecting in any way the guilt or innocence of the other two defendants. It may be considered by you only as affecting the guilt of the defendant Preston, if you believe it does affect his guilt or innocence. You have a right to consider them only in connection with the charge here against the defendant Preston, but not to be considered in any way as to either of the other defendants.

[fol. 269] Cross-examine.

Mr. Leggett: We have no questions of this witness.

The Court: Stand aside, Mr. Davidson.

Call your next witness.

FRANCIS D. SILAS, JR., being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Tell the jury your name.

A. It is Francis D. Silas, Jr.

Q. Mr. Silas, what is your job or profession?

A. I am a special agent of the Federal Bureau of Investigation.

Q. How long have you been a special agent?

A. Something over five years.

Q. How long have you been in Covington, Kentucky?

A. Two years.

[fol. 270] Q. Did you participate in the investigation of the matter now on trial?

A. Yes, sir. I did.

Q. Did you at any time interview any of the defendants who are now on trial?

A. Yes, sir.

Q. And what defendant or defendants did you interview?

A. I interviewed John Sykes and I——

Q. On what occasion was that?

A. That was on January 20th. And I talked to him again on January 25th, 1961.

Q. Now, on January the 20th, where did you interview him?

A. At the Newport, Kentucky, police department.

Q. Who was present at the time of this interview?

A. Myself and Special Agent Shipley.

Q. Were either of the other two defendants present at the time?

A. No, sir.

[fol. 271] Q. Now, with respect to the January 20th interview, would you tell us whether or not he gave you a signed statement?

A. No, sir, he did not.

Q. Did you discuss this matter with him?

A. Yes, I did.

Q. Would you tell us what was said during the course of the interview?

A. It was a rather lengthy interview and I took a considerable period of time. I recorded the interview on the spot because it contained so many names and descriptions, places, highway numbers, and that type thing that—I have it right here and would prefer to read it. It was originally drawn in the form of a signed statement, but, after it was transcribed, he stated that he did not wish to sign it, however he did state that it was true. I read it to him.

Q. All right. Would you read the statement to us then?

Mr. Leggett: If the Court please, I would like to object to that.

The Court: He will testify from his memory of that conversation, but you may use the notes which you say you [fol. 272] made there at the time, rather fully from the standpoint of giving your testimony. You say that this was read to the defendant at the time?

The Witness: Yes, sir.

The Court: What did he say whether or not those facts were true or untrue?

The Witness: He said the facts were true, Your Honor, but that he did not wish to sign it.

The Court: You may read the statement.

Mr. Leggett: If the Court please—

The Court: This is not a statement, members of the jury, but this is the testimony of this witness, who says that he talked to the defendant Sykes and that Sykes made this statement to him, but declined—which he took down there at the time in the presence of the defendant Sykes, is that correct?

The Witness: That's correct. Yes, sir.

The Court: But which Sykes declined to sign. Now, this is not Sykes' signed statement. He did not sign this statement, but the witness will testify from his own recollection about what occurred, but may use the notes to refresh his memory and to state what the defendant said, if anything.

[fol. 273] **A.** He told me that he was born in Monroe, Oklahoma, February 5th, 1935, and that he presently resided at 38 Peter Knoll Homes.

Q. Pardon me. Prior to the time you began your interview with him, did you inform him who you were?

A. Yes. I did.

Q. You did tell him that you were an agent for the FBI?

A. Yes, sir.

Q. Did you tell him anything else before you took the information from him?

A. Yes, sir. I advised him that he was not required to talk to us at all if he didn't want to and that if he did talk to us and that he told us anything that constituted a violation of law, it could be used against him and that he was entitled to the services of an attorney if he so desired, prior to talking to us.

Q. All right. Go ahead.

The Court: Who was present with you at the time? You refer to "us". Who else was there at the time?

A. Mr. Shipley.

[fol. 274] The Court: Mr. Shipley?

The Witness: Yes, sir.

The Court: All right.

A. (continuing) He said that he had been approached approximately two weeks before in the Depot Cafe, in Covington, Kentucky, by a fellow by the name of Red Horn and that Horn had asked him to use his automobile, wanted to borrow his automobile to use in some type of job. And he stated that he declined, telling Horn that he wouldn't loan his automobile to anyone and that a short time later a fellow by the name of Red Murphy, who owned the Depot Cafe, made him an offer of \$500 if he would use his car and drive in the perpetration of some type of job. He went on to say that he inquired as to how easy the job would be and he was told by Murphy that all he had to do was to drive his car within about 10 miles of Berry, Kentucky. He got the impression that some woman, whom he thinks he saw on one occasion in the Depot Cafe, had given information concerning the bank at Berry, Kentucky. This information he says was—is transcribed on a piece of paper and given to one of the fellows that was supposed to have pulled this job, that he understood that there was a woman who—that this

woman formerly was employed by this bank at Berry and [fol. 275] that the information she gave was something about the interior of the bank, the amount of cash on hand, and the fact that there was supposed to have been an alarm system, as he put it, the ~~second~~ teller's cage to the left after you enter the door. For this he said he understood that this woman was supposed to have gotten—was supposed to get \$5,000 for furnishing this information. He ~~did~~ he finally agreed that he would drive the car and on the morning of January 18th, he went to the Sixth Street Auto Fill Used Car Lot, in Newport, and got a '55 green, Buick automobile for a tryout and he drove this car back to Covington, Kentucky.

Q. To where?

A. Well, I say he drove the car from the used car lot to the Depot Cafe in Covington, Kentucky. He then began to tell how he and a fellow by the name of—a bartender named Billy Monroe, and an individual known as Chester Clark drove in this automobile down Highway 27 to the intersection of a road that led off to Berry, Kentucky, and he stated at first that all of these men who he just named were to have been participants in the bank robbery, the robbery of the bank at Berry. Then he stated that he wished to change that [fol. 276] previous paragraph where he had named these people, that it was not correct and he began again.

This time he said that actually who had gone down in the car with him to Berry, Kentucky, was a fellow he knew only as "Chuck". He did not know his last name and that Chuck was from Louisville, that he had recently got out of the penitentiary and that he had gotten two fellows from Louisville to come up and help him do this job, that is, rob this bank at Berry. So he said Chuck and he went down toward Berry, Kentucky, in the Buick automobile, and somewhere along the route a fellow started following them in a 1957 Chevrolet.

Q. Did he say anything about the automobile license tag which was found in the car at the time?

A. Yes, he did. He said that the tag was obtained from Chester Clark:

Q. Did he say who obtained it?

A. Well, he didn't at this particular time. He did at a later interview.

Q. All right. Did he say anything about the pistols that were found in the car at that time?

[fol. 277] A. Yes, yes, he said that Red Murphy who owned the Depot Cafe in Covington, had furnished the Smith and Wesson pistol and that—

Q. Tell the jury what type of a place according to your official information that the Depot Cafe is.

Mr. Leggett: If the Court please, I will object to that at this point. I think we are interested in the statement of the defendant and if we interject the opinion of this officer—

The Court: Objection sustained. He is telling what occurred there, but you interrupt him. Just let the witness go ahead and tell. You have gotten him off. He was telling now about what this defendant said. You have gotten off by asking him collateral questions. Do you want him to proceed?

Mr. Meade: Your Honor, I request that this witness be permitted to read this statement since he has testified that the defendant says the statements contained therein were true.

The Court: No, he can't read it. He is testifying from his memory, but you are taking him back now to describe something about the Depot Cafe. Let him complete his interview with the defendant.

[fol. 278] Mr. Meade: All right.

Q. Go ahead, Mr. Silas.

A. Well, as I said before,—

The Court: Then you can go back and ask him these specific things about the statement if you want to.

A. (continuing) —he said that he had proceeded south on U. S. Highway 27, with Chuck and somewhere along the route there was one lone male had started following their automobile, who was driving a 1957 Chevrolet, and he was told at this time by Chuck that there was nothing to be concerned about, that this was one of the fellows that Chuck had gotten from Louisville to help them with the robbery of the bank at Berry, Kentucky. He said Chuck related their plans, that they would park the 1957 Chevrolet at the intersection of the first road which leads off of Highway 27 to Berry, Kentucky, and that this fellow driving the Chevrolet,

whom he stated name was Marvin, would get out of the car and get in the car with Sykes and Chuck and that they would then go down to the next intersection of a road leading into Berry, Kentucky, and pick up another individual. This one he didn't know his name, but who would be parked there. Then Sykes was to drive into Berry, Kentucky, and cross [fol. 279] the railroad track and pull up alongside the bank as he put it, headed out of town; that the three individuals, Chuck and Marvin and the unknown man, were to rob the bank while Sykes stayed in the car and kept the car running and then they were to make their escape back on Highway 1032 out to U. S. 27, where he would drop—where—where he would drop Marvin and the unknown man at the 1957 Chevrolet. Then Marvin would drive the unknown man in the Chevrolet down to the next intersection, where his automobile was parked and that Sykes and Marvin would then proceed north to Falmouth, Kentucky, where Sykes was to receive his money, \$10,000, and also the cut as he put it, or the share for Chester Clark for furnishing the license plate and the share for Red Murphy for furnishing the Smith and Wesson pistol. And there in Falmouth they were to part company. Chuck was to catch a bus to Louisville and Sykes was instructed to proceed back toward Covington in the Buick, that he was to dump all of the bank robbery paraphernalia that they had gotten together into the river and that Chuck had told him to be sure and throw the license plate out somewhere where it could be recovered and used again. He said instead the plan didn't materialize, when they got down there to the intersection of the road that leads to Berry, Kentucky, they saw some Kentucky State Police [fol. 280] cars and they got cold feet or he did, he backed out and they turned around and came back to Falmouth, and that Chuck parted company with him there, got into the Chevrolet and went back toward the road leading into Berry, where he could notify the third man, the unknown man, that the job was not going to be pulled. He said they would get together and do it again, that he could get in touch with him, care of Dick Asher's Merry-Go-Round Bar, in Louisville, Kentucky.

He drove on back toward Covington after he had parted company with Chuck and he said he was arrested by Detectives of Newport, Kentucky, on as he put it the late evening

of January the 19th, 1961, at which time they found Murphy's gun, the mask, the caps, and the license plate and his own gun, in his automobile, and that is the substance of that interview.

Q. And that was January the 20th?

A. January 20th, yes, sir.

The Court: Does that complete his statement?

The Witness: That particular one. I talked to him again, but that completes that one.

The Court: Well, I will instruct them again.

[fols. 281-282] Now, members of the jury, this witness has testified to statements which he says were made to him by John Richard Sykes, the defendant. Those statements if made were made not in the presence of the other two defendants, so you are expressly admonished and instructed that you shall not consider the statements which the witness says were made to him by John Richard Sykes as affecting in any way the guilt of innocence of the other two defendants, Preston and Strunk. They may be considered by you if considered by you at all only as affecting the guilt of innocence of the defendant John Richard Sykes, if you believe they do affect his guilt or innocence.

Now it is time for the noon recess. I will let this witness stand aside and then you may resume the witness stand upon our reconvening here this afternoon.

[fol. 283] (Reporter's note: The witness, Francis D. Silas, Jr., resumed the stand and testified further as follows:)

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Mr. Silas, did you say that you also interviewed the defendant Sykes on another occasion other than the 20th of December, 1961?

A. Yes, I did.

Q. What date was the second interview?

The Court: Wait a minute. You said the 20th of December. You mean the 20th of January '61?

Mr. Meade: The 20th of January.

Q. What was the second date?

A. It was five days later, January 25th, 1961.

Q. Where was this interview?

A. At the Newport police department, Newport, Kentucky.

Q. Was anyone else present at the time of this interview?

A. Yes. Special Agent Shipley was there and during—well, we used the detective headquarters for it. During the [fol. 284] interview they were conducting business, men came in and out. I couldn't remember just who was there, but it was Special Agent Shipley and I during the entire interview.

Q. Was there anyone else participating in the interview other than you and Agent Shipley?

A. No, sir, not specifically that I can recall.

Q. All right. And this was with the defendant Sykes?

A. Yes.

Q. Did he give you a signed statement on that occasion?

A. No, sir.

Q. Did he tell you anything about the alleged bank robbery at Berry, Kentucky.

A. Yes, he did.

Q. What did he tell you?

A. He said that the statement or rather the discussion that he had had with me previously, the things that he had told me, were not true and he said that in reality there was no Chuck and no Marvin and no unknown white male whose name he didn't know, and that actually it was he, Sykes, John Preston and Kenneth Strunk that had gone to Berry, [fol. 285] Kentucky, with the intention of robbing the bank there. He said that he hadn't told me this previously because he was afraid to, that actually he was afraid of Preston and that in his opinion that Preston might kill him, that Preston had made the statement to he and Strunk that if anybody ratted on him, he would get them.

He said that on the morning of January 18th, 1961, that he had this 1955 Buick automobile and that he and Preston and Strunk went south on Highway 27, to where the ro

intersects, the road to Berry intersects with U. S. 27, and that they first decided that they would run the get-away route, and he described the get-away route as coming out of Berry, Kentucky, they were to take Highway 1032, back to 27, and then Highway 1284 off of 27, over to where 1284 intersects with U. S. Highway 62, and that there they were to travel north on 62 to its intersection with 19, and then take Highway 19 to where it intersected with Highway 10, and then Highway 10 to its intersection with Highway 1011 straight over to the river, which would be Kentucky Highway No. 8 and there they were to proceed to New Richmond, Kentucky, and take a ferry across the Ohio River at New Richmond, and get on U. S. Highway 52, and follow that back into Cincinnati, Ohio, and then subsequently back into [fol. 286] Covington or Newport, whichever they chose. He said while running the get-away route that he had stopped, the three of them had stopped, at a store, a country store, he didn't know the name of it, and he didn't know the name of the place where it was located, but he described it to us as being located between Highway 19 and Highway 1011, on Kentucky Highway 10, and he said you will find it on the left side of the road, going away from the bank and he said while stopped there that he, that Strunk had gone into the store and bought two of the caps that were found in the bank robbery material. These caps were to be used as disguise and he pointed out the two caps that Strunk had bought in this store. One, I recall, was an olive drab cap in color and the other was sort of a navy blue, wool type cap, both of them new appearing caps. He said that he had paid for the caps but that Strunk went in and got them and that when he brought them back to the car that Preston wanted to get the backs of the caps so that they would come down further over your face and as he had cut the other caps that they had, however he refused to let him do it because he just spent two dollars for new caps and he just didn't want them cut. He said Preston wanted to cut them with a razor blade that he carried in his artificial leg. He said that among [fol. 287] the bank robbery material that they had assembled, the one gun, the one other than his own, had been obtained by Preston from Red Murphy, that he said owned and operated the Depot Cafe in Covington, Kentucky, and that the Kentucky license plate that was among this para-

phanalia had been obtained also by Preston from Chester Clark, and that these men were supposed to have received some remuneration for the use of these two items after the robbery. He said that after they had run the get-away route they proceeded back to U. S. 27 toward Berry, Kentucky, and when they got to the intersection of 27 and 1032, where the road leads into Berry, Kentucky, that they saw two Kentucky State police cars there and Sykes said he just got cold feet, he decided that he didn't want to do it, he didn't think it could be carried out successfully with that much police activity around there. He said that Preston didn't agree with this, that he pushed to go on and do the job, he wanted to go on and rob the job, but Sykes said, no, that he definitely wouldn't do it and that by agreement, they drove back away from the area with the idea that they would try it again, maybe a few days later under more favorable circumstances.

The Court: Does that conclude his statement, Mr. Silas?

[fol. 288] A. I was just trying to think, Your Honor.

The Court: You go ahead. Whenever you are finished with his statement I want to give the jury an instruction.

Q. Did you question him regarding the license plate, as to their intended use of it?

A. Oh, yes, yes. The license plate was—he said the coat hanger type hooks were put on the license plate by Preston so that it could be easily slipped on the other plate on the car for use in the get-away and then removed at some other time.

Q. Did you question him regarding the obtaining of the 1955 Buick?

A. No, sir. No, I didn't talk to him about that.

Q. Is that pretty—does that pretty well cover your interview with him on that occasion?

A. That's it.

The Court: Members of the jury, the witness has testified to certain statements which he said were made to him by the defendant Sykes. These statements were made, if you believe that they were made, to this witness by John Richard [fol. 289] Sykes, but not in the presence of either of the

co-defendants, John Preston or Kenneth Ray Strunk, and you are expressly admonished and charged that you are not to consider these statements which the witness says were made to him by Sykes as having any bearing whatsoever upon the guilt or innocence or either Preston or Strunk. They were not present, had no opportunity to deny or explain anything and they are therefore not held accountable for what Sykes may have said. You may consider these statements if considered by you at all only as affecting the guilt or innocence of the defendant Sykes, but in no wise to affect the other two defendants.

Q. Mr. Silas, I will ask you to pull the black board out here—

The Court: The marshal will pull it out there for you.

Mr. Meade: I would like for you to get the pointer from the clerk.

Q. Now, Mr. Silas, while you were talking up there, you recited numerous highway numbers. How is it that you were able to remember the different numbers of the highways?

A. Well, after Mr. Sykes had given us the information, I ran this get-away route myself in an automobile to see that it actually did exist.

[fol. 290] Q. Now, at the time the numbers on these different highways were given to you, did the defendant Sykes have a map at his disposal?

A. No, he did not.

Q. Do you know whether or not the defendant Sykes can read?

A. He says he cannot read.

Q. Now, I would like for you to—did you draw this map yourself?

A. I did with very few exceptions. Special Agent Shipley assisted me somewhat in tracing it. Of course, we did it right together.

Q. Is that a trace over a natural map?

A. Yes, it is.

Q. Now, I would like for you to start in the City of Covington and point out the escape route as described to you. You say you actually ran this route?

A. I did.

Q. From the beginning down and then the route back.

A. Well, beginning from the courthouse in Newport, Kentucky—

[fol. 291] The Court: (interposing) Let me suggest that you first give an explanation of the map. Show where the town of Berry is on the map before you actually begin to trace the route, so the jury will know what you are talking about.

The Witness: All right, sir.

A. (continuing) Here at 7th and Scott Streets in Covington, Kentucky (indicating), of course the river (indicating), of course the City of Cincinnati (indicating), and across the Licking River (indicating), Newport. Beginning from Newport courthouse, coming south, I went over to York Street and I went south on York Street to 11th and then over one block where I could go south again on Monmouth Street and Monmouth Street is U. S. Highway 27 or becomes U. S. Highway 27. I proceeded south through the City of Alexandria and south down through Campbell County, Pendleton County, passed through the City of Falmouth and into Harrison County, to reach this intersection here—this road is Kentucky 1032—it is marked 1032. I photographed that intersection there, as I did all the others here. This proposed route then was from the bank at Berry to Highway 27, (indicating)—

Q. Now, you pointed to the left there at the end of the [fol. 292] red mark. Is that approximately where the town of Berry is located?

A. Right here, yes, (indicating).

Q. All right.

A. Berry, Kentucky, Cynthiaana (indicating), and I suppose I got off the track but Cynthiaana is still further south in Harrison County from this intersection (indicating), but here is this city of Berry.

As he described the escape route, it would be from the city of Berry, out Kentucky Highway 1032, back to Highway 27, that would be U. S. 27 (indicating), and he says "there we went south one mile to the intersection of 1284." That distance is approximately one mile. It might be a little more than that, from this intersection (indicating). This, I am told, is—this is an unmarked intersection. I am told that it is a part of the old highway 27 that merely made a

loop around through here and came back on to what is now U. S. 27. This is the intersection of 1032 and 27 (indicating), but he says, "We took Kentucky 1284 from 27 to its intersection with 62." That is right here (indicating)—62 comes in from the east this way (indicating) and continues along with 19 just a short distance in here and 19 branches off by itself and it intersects with Kentucky 10 right here at a little town that is known as Powersville (indicating). It is just outside of Brooksville, the county seat of Bracken County. At Bowersville, Kentucky, Kentucky 10 branches [fol. 293] off and goes through Berlin, Kentucky, and just approximately one mile beyond Berlin it intersects with 1011 and 1011 will take you—it is a very poor road, but it will take you eventually over to Kentucky 8 and you can parallel the river all the way back actually into Dayton and Bellevue and subsequently to Newport. However, the route was to take Kentucky 8 to New Richmond and there there is a ferry that operates in New Richmond. It isn't operating now. It wasn't, when I went over this route the last time it wasn't operating, but there—I didn't cross the river, of course, and I didn't come back in on U. S. 52. I merely stayed right on Kentucky 8 until I got to Fort Thomas and then came through Fort Thomas back down into Newport.

Q. Did he state that it was their intention to cross the river there at New Richmond?

A. That is what he told me.

Q. And come down the Ohio side?

A. Come down the Ohio side of the road.

Q. Now, what type of road is this determined route other than Highway 27?

A. It is very good road, all of it good, it is blacktop road, even 1011 here is good road only it just isn't in as good condition [fol. 294] as the balance of the road, but it is certainly passable and it is crooked, very crooked.

Q. Are all of these Kentucky highways?

A. All with the exception of 27 and 62. They are U. S. highways.

Q. Now, I notice two intersections there at Highway 27 leading into Berry. Can you explain the route they would take in and the route they would return on? I don't think that was made exactly clear.

A. It wasn't made exactly clear to me other than that

they were to go off the Highway 27, on to 1032, into Berry, rob the bank, come back out to Highway 27. Now, he didn't say whether he would come back this way or whether he would come back this way (indicating). He did say something about a fork in the road, but I—he didn't describe this thing in detail here, that little arm off there (indicating). He said, though, that, "When we got back to 27 we would go south one mile to Kentucky 84."

The Court: You mean north one mile, don't you?

The Witness: No, sir. South. If they came back out this [fol. 295] way, it would be south one mile.

The Court: I see. All right. Yes, south one mile.

A. (continuing) South one mile to Kentucky 1284 and then over the route that I described.

Q. Now, you said he mentioned some Kentucky State police there at one of the intersections. Do you know about where he told you those state police were located?

A. He told me at the intersection of 27 and 1032, where the road led off to Berry, Kentucky, he said is where they saw police cars.

Q. And what date was that?

A. January 18th, 1961.

Mr. Meade: All right. You can shove that back unless you want to examine him on this map right now.

Mr. Leggett: I don't think so.

Mr. Meade: Just one minute on that. I am sorry.

Q. Will you tell us the distance from Covington to Berry, Kentucky? Did you check the mileage by your automobile?

A. I checked this mileage on a government car that is [fol. 296] assigned to me for use. From this arrow at Newport courthouse (indicating) to this arrow at Berry, Kentucky (indicating), right in front of the bank, and I measured that distance at 51.4 miles.

Q. How far is it from the bank of Berry to the little town of Berlin, if you know?

A. Well, I have an arrow marked here at Berry and another one at Berlin and that distance over the route described to me is 31.6 miles, from here (indicating) to here (indicating).

Q. And you say, though, that you did not cross the Ohio River at New Richmond?

A. (Shaking head negatively)

Q. Therefore you would not be able, I assume, to give an accurate account of the mileage from Berry following their escape route back into Covington?

A. No, sir. I leave the escape route here (indicating). I, of course, know the total mileage all the way back into where I started from, but I didn't go over U. S. 52.

Q. What is the mileage by traveling the Kentucky side from Berry back into Covington, Kentucky?

A. It was 136 miles.

[fol. 297] Q. Thus the entire round trip?

A. Yes, sir.

Mr. Meade: All right. You may cross-examine.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Mr. Silas, I understand that you talked to the defendant Sykes the first time on the 20th of January, is that correct?

A. That's correct. Yes, sir.

Q. And at that time he made this first statement to you, which you recited to the jury?

A. That's correct.

Q. Now, I will ask you to state whether or not you made an investigation based upon this first statement.

A. We attempted to make some investigation, based upon that first statement. That is to say, we evaluated it or tried to evaluate it and it was so nebulous, there was very little we could do with the first statement, toward identifying the other parties involved.

[fol. 298] Q. I will ask you to state whether or not you made an investigation with respect to the hand weapon which is marked Government's Exhibit No. 2.

A. I talked to Elmer Joyce about that gun, about whether it was purchased from him or not.

Q. Then you traced this weapon to the Joyce Gun Shop?

A. Yes.

Q. And you did that by the serial number?

A. Serial numbers, yes, his records.

Q. I will ask you to state whether or not you made an investigation with respect to this hand weapon which is marked Government Exhibit No. 3.

A. We had it checked through the National Stolen Property file, the numbers. We checked with Elmer Joyce Gun Shop here, with Covington and Newport PD pawn shop records on that gun, and we questioned a fellow by the name of Red Murphy that was supposed to have supplied it to begin with as to whether it was his or not.

Q. I will ask you to state what the result of your investigation was.

[fol. 299] A. We were never able to identify the source of that gun.

Q. I will ask you to state whether or not you made an investigation to ascertain the source or the identity of any of the other items which were discovered in the motor vehicle, the Buick automobile.

A. Specifically, sir, which items?

Q. Oh, say for instance these other two caps which were there.

A. No. We had no information that we could check as to the source of those caps.

Q. The gloves?

A. No.

Q. The license plate?

A. Yes.

Q. I will ask you to state what the nature of your investigation was with respect to the license plate.

A. We talked to the gentleman that was supposed to have originally supplied it.

Q. And what is that gentleman's name?

A. Chester Clark.

[fol. 300] Q. And where did you locate Mr. Clark?

A. In Covington, Kentucky.

Q. And when was this that you discussed the matter with him?

A. I would say—(pausing) it took us awhile to locate Clark. It might have been around the 27th, maybe 28th of January. There was a few days lapse in there. We couldn't find him at first.

Q. In other words, you discussed this matter of the license

plate with Mr. Clark after you had taken the second statement from the defendant Sykes, is that correct?

A. Yes. I believe so. I believe it was after I took it—well, it may not have been—now I am not certain of that. You see, I talked to Sykes on the 25th the second time. I might have talked to Clark either on the 25th or maybe a day or two later, right about that time, though.

Q. Was there another agent with you at the time that you had the discussion with Mr. Clark?

A. Yes.

Q. Who was that agent?

A. Special Agent Shipley.

[fol. 301] Q. How long have you been an FBI agent, Mr. Silas?

A. It is a little over five years.

Q. And during this time you have had occasion to interview numerous people in connection with the commission of crimes, have you not?

A. Yes, sir.

Q. And you have talked to any number of people, both witnesses and suspects in connection with those crimes?

A. Yes, sir.

Q. Now, during this time, have you developed an ability to recognize a person who might be classified as a pathological liar?

A. I wouldn't profess to be able to tell when a person is lying, no, sir. At the very time I think I can I am wrong.

Q. Can you generally recognize whether a person is telling you the truth or a falsehood?

A. Sometimes I think I can, but—

Q. I think all of us think we can at times.

[fol. 302] A. I think I can, but unless I can check some of the circumstances I am never satisfied that I can.

Q. Then you are not satisfied with a mere statement until you go out and actually check the details and actually ascertain the truth or falsity by independent witnesses?

A. I try to corroborate it any way I can, yes, sir.

Q. Now, when you took these statements from the defendant Sykes, was he under oath?

A. No, sir.

Q. Then these statements were not administered under oath?

A No, sir.

Q. They were not in front of a magistrate or notary public?

A. No, sir.

Q. They were statements which the defendant Sykes made to you in the presence of yourself and another FBI agent?

A. That's correct.

Q. Now, when you interviewed Mr. Sykes on the 25th [fol. 303] of January, what was the occasion of this interview? Did he call you?

A. No, we went specifically to talk to him.

Q. And what was your reason in so doing?

A. One thing I wanted to ask him was if he knew anything about an automobile that we had information had been seen down there around Berry, Kentucky, and that was very vague also. It was supposed to have been a Buick car, a dark top, canary yellow on sides or some type of yellow and a dark bottom and supposedly had Jefferson County license plates on it. If he knew whether—knew who that car belonged to or had he been down in Berry, Kentucky, in the car and he said, no, he had been down there numerous times, at Berry, for the purpose of casing this bank, but that he had only been there in three different automobiles and he described those cars to me that he had been there in.

Q. Now, in the first statement which he made, did he tell you who it was that was supposed to have cased the joint?

A. Oh, in the original statement?

[fol. 304] Q. Yes.

A. No, he said he didn't know who it was.

Q. It was some lady I believe you said?

A. It was a woman, yes.

Q. Did he at that time advise you as to what the escape route or the proposed escape route was?

A. No, no.

Q. He just stated generally that he was supposed to return to Falmouth and to drop off this other fellow and then drive elsewhere?

A. That's right. They were to proceed by a different route from him, according to—

Q. I believe you said one fellow was supposed to get on a bus and ride back to Louisville and the others were going to do something else in another car or something like that?

A. That's right

Q. But he did not go into detail as to how he was supposed to go?

A. No.

[fol. 305] Q. But he did state to you in detail how the money was to be distributed, did he not?

A. Somewhat in detail. He said that Murphy wanted \$2,000 for the use of his gun, however this fellow Chuck he had described was only going to give him one thousand; and that Clark was supposed to get something for the license plate.

Q. Did he say how much Clark was supposed to get?

A. I believe he said later it was a thousand dollars, maybe he said it the first time—yes—Chester Clark was supposed to get a thousand dollars for the use of the license plate and he and Sykes were to get \$10,000 for driving the car and he, Sykes—

Q. And I assume the balance of the money was to be distributed among Chuck and Marvin and whoever else was involved in the plot?

A. Yes, sir.

Q. Did he say how much the expected haul was to be?

A. He expected it to be in excess of a hundred thousand dollars.

The Court: How much?

The Witness: In excess of one hundred thousand dollars.

[fol. 306] A. (continuing) He said he had been told that there was that much available.

Q. At the time that you interviewed Chester Clark, were you able to ascertain anything with respect to this license plate?

A. Yes, he admitted that it was his, that he had made two plates like that, one a similar number and all for Mason County and he made one for 1960 and one for 1961, that this plate had been out of his possession though for some time as he put it. He would not absolutely—he was not

absolutely certain how long, but it had been out of his possession for some time.

The Court: Members of the jury, the same admonition goes as to statements made by the witness on cross-examination of what Sykes said to him as I have heretofore given you with reference to the other two statements. You are not to consider these statements as having any bearing on this case so far as the other two defendants are concerned. They may be considered by you if considered by you at all only as affecting the guilt or innocence of the defendant Sykes and not as to either of the other two defendants.

Mr. Leggett: No further questions.

[fol. 307] The Court: Stand aside, Mr. Silas.

Call your next witness.

CHARLES SHIPLEY, being called as a witness in behalf of the plaintiff, first being duly sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. What is your name?

A. Charles Shipley.

Q. Where do you live, Charles?

A. I live in Erlanger, Kentucky.

Q. And what do you do?

A. I am a special agent, Federal Bureau of Investigation.

Q. Stationed—

A. Covington. Here in Covington, Kentucky.

Q. How long have you been a special agent?

A. Since June 1942.

Q. That is approximately eight years, nine years?

The Court: Eighteen.

[fol. 308] A. It will be 18 years in June.

Q. Did you participate in the investigation of this case which is now on trial?

A. I did. Yes, sir.

Q. And what was the extent of your investigation, Mr. Shipley?

A. Well, actually, I participated in practically all of the investigation. A number of interviews—I did not participate in the first interview of Mr. Strunk or of Mr. Preston—some of the investigation at Berry, Kentucky, was conducted while I was not there, but other than that, I participated in just about all of it.

Q. Did you sort of guide the investigation of this case?

A. Yes, sir. Well, the case was assigned to me.

Q. You say you did not participate in the first interview with the defendant Sykes?

A. No. First—I did participate in the first interview of Mr. Sykes, but not the first interview of Mr. Preston or Mr. Strunk.

Q. Did you participate in the second interview with Mr. Sykes?

[fol. 309] A. Yes.

Q. You have heard Mr. Silas testify on the stand, have you not?

A. Yes, sir.

Q. Regarding both statements?

A. Yes, sir.

Q. Is it your impression that the information to which he testified is substantially correct?

A. That's correct.

Q. Did you interview the—you said you did not interview the defendant Strunk on the first occasion?

A. No, sir.

Q. Did you interview him, yourself, on the second occasion?

A. Yes, Agent Silas and I interviewed Mr. Strunk on January the 25th of this year.

Q. Where was that?

A. That was at Newport police department.

Q. Was either of the other defendants present at the time that you interviewed the defendant Preston?

[fol. 310] A. No. Just Mr. Strunk.

Q. Did the defendant Preston furnish you a signed statement?

A. No. We are getting crossed here somewhere. I interviewed both.

Q. The defendant Strunk is what I meant.

A. The only thing that would be different would be the dates. I interviewed Mr. Strunk on January the 26th and Mr. Preston on the 27th.

Q. In your interview with Mr. Strunk, now did he give you a signed statement?

A. No, he did not.

Q. Did you discuss the case with him?

A. Yes.

Q. What did he say about the case?

A. Well, the particular point of discussion at that time when we actually went back to talk to Mr. Strunk was the matter of the purchase of two of these caps that have been introduced here as evidence. Mr. Strunk at that time told us that he had in fact gone to Berlin, along with John Sykes in this 1955 Buick automobile. He said at [fol. 311] that he was driving the car, that they came into Berlin and he noticed a small—or a country store there and stopped by this store and told Sykes that he, Strunk, was going into the store to buy a bottle of pop. As he got out of the car, Sykes handed him some money and said, "While you are in there, if they have got a cap, I wish you would buy me one." In fact he said, "If caps are cheap, maybe you had better buy me a couple." So he went on into the store, bought a bottle of pop and drank it and then asked the owner of the store if he had a shop cap and the man, owner, showed him some caps and he then bought two caps here which I could point out. He at that time was looking at the caps and showed us the caps that he had bought. One was a blue, wool cap and the other a sort of olive drab, cloth type of cap.

The Court: Are these the two caps that have been made exhibits?

The Witness: They are the same two.

The Court: And were they showed to him at the time?

The Witness: Yes, sir.

The Court: And he identified them?

[fol. 312] The Witness: Yes, sir.

A. (continuing) It was pointed out to him at that time that Mr. Hedges, the owner of this store, had identified a mark in the blue cap as his own particular mark and could state that that cap came out of his store. Mr. Strunk then

said that he did purchase these caps. He said that he took the caps back to the car, handed them to Sykes, gave Sykes his change that was coming from the money that he had given him. I believe he originally said that he had given him two dollars. He said that he didn't ask Sykes what he wanted with two caps. He didn't seem to have any particular curiosity about them. He didn't know what became of the caps after that. He simply gave them to Sykes and that was the last experience he had had with the caps.

Q. Did you ask him why he had previously denied knowing about those caps?

A. Yes, I did.

Q. What did he say?

A. He said that he hadn't previously been asked.

Q. All right. Go ahead.

A. He also at that time told us that he had been down in the country in the vicinity of Falmouth and Berlin a [fol. 313] number of times with Sykes in automobiles for the purpose of Sykes selling these automobiles. They had done considerable driving according to the way he described it. When he was asked who they had contacted to make a sale or any prospective customers, he said that no customers had ever been contacted on any of these trips. His reason for being with Sykes on these trips he stated was that Sykes was lazy and didn't like to drive.

Q. Did you ask him whether or not he had ever been in the town of Berry, Kentucky?

A. I did. He said he had never been in the town of Berry, Kentucky, to his knowledge.

Q. Would you point out to the jury the defendant Strunk?

A. He is the man sitting in the checked shirt with the glasses.

(Reporter's note: The defendant indicated by the witness stood.)

Q. Now, I believe you said that you also interviewed the defendant Preston?

A. Yes, sir.

Q. Is that correct? Would you point out the defendant Preston to the jury?

[fol. 314] A. He is the fellow in the red shirt.

Q. The one with the mustache?

A. The one—he has now.

Q. Did he have a mustache when you—

A. No, the first time I observed him with a mustache is when he appeared here in court.

The Court: Now, members of the jury, before he begins to testify about his interview with Preston, you are instructed that these statements made to Mr. Shipley by this defendant, if you believe they were made by the defendant Strunk, will be considered by you only as affecting the defendant Strunk, not as to either of the other two defendants. The same admonition that was given you in that connection. You understand, of course, this is only evidence, statements made in the presence of this witness and the man who is making the statement. There was no other defendant present, so they do not have an opportunity to deny anything that is said. So it cannot be considered as affecting the guilt or innocence of the defendant Preston or Sykes, only as to the defendant who makes the statement, if you believe it does affect his guilt or innocence.

[fol. 315] Q. What was the date on which you interviewed the defendant John Preston?

A. The 27th of January, this year.

Q. Where was that?

A. At—it was in Detective Headquarters, Newport Police Department.

Q. Were any of the other defendants present at the time the defendant Preston was interviewed?

A. No, neither of them.

Q. Did he give you a signed statement?

A. No.

Q. Did you discuss with him the proposed robbery of the bank at Berry, Kentucky?

A. Yes, sir, I did.

Q. What did he tell you?

A. Well, at this time it was discussed with him a number of the facets of this whole situation—I mean of the procurement of the car, relative to the procurement of this Buick automobile. Mr. Preston stated that he had gone with John Sykes to the Sixth Street Auto Fill Sales, there in Newport, and together with Sykes had told the pro-

[fol. 316] prietor that he, Mr. Preston, needed an automobile for the purpose of going to Lexington, Kentucky, where Preston was to contact his attorney; that the purpose, the reason for contacting this attorney was that he had a suit pending against a railroad, the Erie Railroad, this suit growing out of an accident in which he was involved that resulted in the loss of one of his legs; that he was to contact this attorney for the purpose of signing some papers, signing a release; that upon signing this release, he would secure a settlement, some money as a result of this accident, as damages, and with part of this money, he would then return to Newport and purchase from this car dealer a 1956 Chevrolet. He said that this story, in fact, was not true, that they had no intention of going to Lexington, that he had, in fact, been involved in an accident on the railroad and had had a claim against the railroad, but that this claim had been settled early in 1957. He said that the reason for telling this story to the car dealer was that he was simply doing a favor for John Sykes as John Sykes needed an automobile and that this story was told just so that Sykes could procure the car.

Q. Did you question him regarding any of the items which had been found in the 1955 Buick automobile?

[fol. 317] A. Yes. We questioned him about the license tags, guns. He said he didn't know anything about them, where they came from or how they got in the car.

Q. Did you question him with regard to the caps?

A. Yes. He said he was not present when the caps were purchased.

Q. Did you question him with regard to the cord which was found on his person?

Mr. Leggett: If the Court please, I am going to object to him leading the witness, one by one, through this.

The Court: Overruled.

A. Relative to the cord which was found on his person, he said that where he lived in Covington, 229 Riverside Drive I believe the address is, that he had been preparing some old newspapers or handling them up, and that he had used such cord and apparently had had a piece of it left over and stuck it in his pocket. He then later

made some statement about having gotten the cord out of the glove compartment of the automobile. He gave two stories there. I am not sure which he intended that was actually the source of the cord.

Q. Did you question him with regard to the band-aids? [fol. 318] A. Yes. He said the band-aids that had been on his person were for the purpose of putting on a finger, where he had a finger cut, which he actually did have a cut on his finger—I mean somewhat of a bad cut on one of his fingers at that time.

Q. Did you specifically ask him if it was his intention to participate in the bank robbery?

A. Yes. He at that time told us that he in fact had been approached to participate in a bank robbery of the bank at Berry, Kentucky. He said the first approach was made to him approximately a week or eight days before the time he was arrested by the Newport police department. He said that four men had approached him and asked him to participate in the robbery of this particular bank and he at that time had refused these men. He refused to identify these four men.

Q. Did he say whether or not he had discussed this bank robbery with the other two defendants?

A. Later in the interview, he stated that he had specifically discussed the robbery of the bank of Berry, at Berry, Kentucky, with John Sykes, and Kenneth Strunk, this discussion having taken place at the Depot Cafe, but said [fol. 319] this discussion was in the preliminary stages.

Q. He discussed this where?

A. At the Depot Cafe. This discussion between the three men took place in the Depot Cafe in Covington.

Q. Did you question him regarding the license plate?

A. Yes. He said he knew nothing about where the license plate, the source of it, where it came from.

Q. Did you question him regarding any of the other items found which I haven't mentioned here?

A. Yes. He said he knew nothing about these items, where they came from, or had had no part in the preparation or the cutting of the caps which had been alleged by some of the other men.

Q. Did he name any individual which had—who had approached him regarding this robbery of the bank?

A. He declined to do that. He declined to name the men.

Mr. Meade: You may cross-examine.

[fol. 320] The Court: Now, members of the jury, the same admonition applies to the statement which this witness says was made to him by Preston. It may be considered by you, if you believe it was made, as affecting only the guilt or innocence of the defendant Preston. It will not be considered by you as having any bearing whatsoever upon the case against the other two defendants.

Mr. Meade: One further question.

Q. Were you present when Mr. Silas—with Mr. Silas when he interviewed Chester Clark?

A. Yes.

Q. Do you remember the specific date on which that interview took place?

A. January the 27th, 1961.

Mr. Meade: All right.

Cross-examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. Agent Shipley, did you identify yourself to Mr. Strunk?

A. I did.

Q. What did you tell him?

A. Agent Silas—well, we both told him we were special agents, FBI.

[fol. 321] Q. You told him that anything he said could be used against him?

A. I did at the beginning of the interview and also had an occasion to readvise him of that fact during the interview.

Q. Now, you went to the Newport jail specifically to ask him about the two caps, is that correct?

A. That is one of the reasons, yes, to ask him about this matter generally.

Q. And he told you where he had purchased the caps?

A. We of course—he did, but we first told him where he had purchased—

Q. Well, he admitted purchasing the caps, didn't he, in Berlin, Kentucky?

A. Yes, after we pointed out to him the caps, the man's mark on them, and told him the exact movements that he took after he got in the store, exactly what was said, and what was done.

Q. How long was he in the store in Berlin, Kentucky?

A. I don't know, sir. I assume from talking to Mr. Hedges, maybe a matter of 10 minutes,

[fol. 322] Q. Ten minutes?

A. Yes.

Q. He went in and drank a soft drink and ate a couple of bars of candy just like any other normal purchaser would do, didn't he?

A. You, of course, are asking me for something that I don't know. I know what each person said.

Q. Well, you said you told him everything that he did and so forth?

A. I know what Mr. Hedges says. Mr. Hedges said that he came into the store, turned immediately to the left, went to where the caps were, purchased the caps and that was the substance of what he did in the store. Mr. Strunk said he bought a bottle of pop and then went and bought the caps.

Q. Who told you he was in the store for 10 minutes? Hedges?

A. I just told you that I don't know. I would assume from Mr. Hedges and what he said that it would be five or ten minutes. I don't know.

Q. Did Hedges say that he drank a soft drink in his store?

A. No, sir.

[fol. 323] Q. Strunk said that?

A. Yes, sir.

Q. Did Hedges deny that?

A. I have no reason to ask Mr. Hedges again, sir, as to whether or not he did. When I talked to Mr. Hedges was before Mr. Strunk had told us that he purchased the caps there.

Q. Getting back to Sykes again, you interviewed this Sixth Street Fill Auto Sales owner?

A. Yes, sir.

Q. Did he bear out the fact that Sykes did frequently take automobiles to sell for him?

A. Yes, sir.

Q. He admitted that, didn't he?

A. Yes, sir.

Q. Did you ever check to determine what Sykes' employment was?

A. No, sir, nothing other than what he told us.

Q. What did he tell you his employment was?

A. He told us he was unemployed. I heard Agent Silas or the other testimony here. I believe that he did say [fol. 324] something about he had been a furnace salesman.

Q. When you interviewed Mr. Preston, I believe he testified that you found some band-aids in his artificial leg?

A. No, sir.

Q. You did find some band-aids, did you?

A. No, sir, I found nothing. I found none of this.

Q. Do you know of your own knowledge if Preston's leg was cut at the time he was in Newport jail?

A. I don't—his leg?

Q. Was cut?

A. I have no knowledge of that whatsoever. I know that he walks, of course, with a limp and he told us that he had an artificial leg, which I am sure is true, but I have no knowledge at all of any cut on his leg or anything of that kind.

Q. Now, he related to you, I believe you described it as a preliminary discussion, some sort of job in the Depot Cafe?

A. He described it as that.

[fol. 325] Q. Were those his words, "preliminary", or yours?

A. That was his.

Q. Did you go into that with him?

A. That—we would have gone into it much further if he was willing to go. That was as far as he was willing to go. That was our purpose there.

Q. He did name the four individuals?

A. Sir?

Q. He did say four men were there?

A. He did say four men originally had approached him to rob this bank of Berry, at Berry, Kentucky, and that he had refused. He said, he later on in the interview said that he had discussed robbing this particular bank with these two other men here, that the three of them had discussed it together, but he says this discussion was in the preliminary stages. Those are the words he used.

Q. What he discussed with the three was what the four men had discussed with him?

[fol. 326] A. No. He said that he discussed with them, these three men here, here discussed together robbing the bank of Berry, at Berry, Kentucky.

Q. Yes, but you don't know whether he was referring to the discussion, the four men with him or not, do you?

A. Sir, the whole thing.

Q. Well, do you or don't you?

A. I do. Certainly I do. The whole thing that we were interviewing him about was a plan or a conspiracy to rob a bank at Berry, Kentucky, using this paraphernalia. The first interview of him which I did not participate in, but I had knowledge of it from an investigative standpoint that he had denied having any knowledge whatsoever of any such plan, that his knowledge was this, that at first he had been approached by four men, whom he refused to identify, to help rob this bank, but he refused these four men to participate. He then said that later he had discussed with these two other men that are sitting here at the table, these defendants, that he had discussed with them robbing this bank, but that this discussion of this robbery was in the preliminary stages. I don't know how to make it any plainer.

Mr. Elfers: No further questions.

[fol. 327] The Court: Stand aside.

GOVERNMENT REST

Mr. Meade: If Your Honor please, that completes the government's testimony.

The Court: The government rests.

Mr. Leggett: If the Court please, the defense has a motion that it would like to make, however we would like to have a few minutes recess in order to prepare.

[fol. 328] (Reporter's note: The court recessed for ten minutes. At the conclusion of the recess, all the defendants were present with counsel, and the following occurred out of the presence of the jury.

The Court: Make your motion, Mr. Leggett.

DEFENDANTS' RENEWAL OF MOTION TO SUPPRESS AND OVER-
RULING THEREOF

Mr. Leggett: If the Court please, at this time I would like to renew my motion to suppress the evidence, which was made preliminary to the trial.

(Reporter's note: Argument was made by counsel in support of the motion.)

Now, I respectfully submit to this court that in the incident which we have demonstrated here by the testimony of witnesses, these men were arrested at Tenth and Monmouth for vagrancy, they were then removed from that point to the jail, which is located between Third and Fourth on another street; they were taken in, they were questioned, they were searched, their persons were searched, they were then taken back and put in the jail. Then a search was made not in their presence, in fact, specifically outside their presence, and sometime after the arrest. The search was made at the automobile and certain evidence was obtained.

I further point out to the Court that there has never been [fol. 329] a judicial ruling in the Commonwealth of Kentucky with respect to the legality or the illegality of the search. There has been no judicial determination as to

the guilt or innocence of these persons, whether they are vagrants or not. In fact, the testimony here on the stand shows that one of those men shelled out at 8 o'clock that evening the sum of \$150 to pay for an automobile. That isn't the act of a vagrant. I submit to the Court that it is my considered opinion that these men are entitled to a judicial determination by the Commonwealth of Kentucky as to whether or not they were unlawfully or lawfully arrested and upon that determination hinges the question of whether this was or was not an unlawful search and seizure in violation of their Constitutional rights. I respectfully submit to the Court that this evidence that has been offered here in this court was produced as a result of a search which we don't know about. We have no way of knowing whether it is lawful or unlawful. I know the Court in entertaining my motion indicated that some of the circumstances surrounding these men being picked up tended to indicate that they were vagrants, but I know that the Court is not attempting to ascertain whether these men were guilty of an offense under the laws of the State of Kentucky. It is fundamental that the jurisdiction of this [fol. 330] court relates to federal offenses and not to some incident which occurred at the intersection of Tenth and Monmouth in the City of Newport. We don't know right now whether these three men seated here are vagrants under the law of the State of Kentucky. I don't know what a vagrant is. I have been practicing law some time in Kentucky and I still don't know what a vagrant is. But I know no vagrant that I know of can shell out \$150 in the evening to purchase an automobile and then because he doesn't have any money at 3 o'clock the next morning, I can't see that that man is automatically a vagrant. I think these men are entitled to a judicial determination of that question.

I further point out to the Court that there could be no prosecution on this carrying concealed weapons charge until such time as the Kentucky courts ascertain whether or not such search was lawful or unlawful.

Now, it is my understanding of the "silver platter" doctrine that in order to determine whether or not evidence is admissible in the federal court, the lawfulness or legality of the search and seizure must be definitely estab-

lished. For this reason I would like to renew my motion to suppress the evidence in this particular case.

The Court: The Court is of the opinion that the arrest [fol. 331] was lawful and therefore the search was lawful. They have no guarantee against a search of their property, their person; or their automobile or their homes or any other of their personal or intimate effects, except that the search be unreasonable. There is no guarantee against search and seizure except there is a guarantee against unreasonable search and seizure.

Now, the courts have held repeatedly and permitted stopping automobiles along the side of the road and search thereof. The courts of appeal have held time and again that that was a lawful search where they have reason to believe there was the commission of a violation of the law. These men had been parked from 8 or 9 o'clock until 3 o'clock in a business section with apparently no purchase, no reason to be parked in the business section of a city. And you or anybody else would place yourself under suspicion. If the police department weren't suspicious of that kind of conduct, you ought to get another police department. You can't wait until a robbery or something occurs and then say, "We didn't know anything about it." They had been parked there five hours. They had gotten in and out of that car. At least they had gotten telephone calls—the police station—that these men were acting suspicious. They were afraid of them. Why shouldn't they be? You [fol. 332] would be, I would be—parked right there on the side of the street there in the business section of the town, where there were jewelry stores and banks within a reasonable distance, some of the officers went there and questioned them and the more they questioned them the more suspicious they acted; they told them things that weren't true, they said they were waiting there to see a truck driver that was going to stop a block and a half down the street, and various other things that they told them there; so they said, "Come with me," and they took them into custody for vagrancy—they gave no reasonable explanation. You can't use the streets of a city just to suit yourself. Other people's rights are to be considered and it is the obligation of the police force to see that they are. If they had given them a reasonable explanation or had some

rational approach to it, they would have gone ahead and left them alone, but they didn't. They didn't give them a reasonable story. The police acting under a telephone conversation that they relied upon that these men were acting suspicious, been parked there for five hours, after questioning them and going into some detail with them, they felt it their duty to take them into custody and they did take them into custody on the vagrancy charge because of the circumstances and then searched them incident [fol. 333] to that arrest because one of them said they wanted to get some cigarettes and they went down there to get some cigarettes and there were no cigarettes. There was no protest against the search of the car. The car was open. One of the officers had driven it down there and they found in the car, not locked up but in the car, two loaded revolvers.

Let the motion be overruled.

Mr. Leggett: I have one question I wish to ask the Court as to whether the Court is measuring the reasonableness of this search by the law of the Commonwealth of Kentucky or by the case law of the United States?

The Court: Both.

Mr. Leggett: Both. Thank you, Your Honor.

DEFENDANTS' MOTION FOR A JUDGMENT OF ACQUITTAL AND OVERRULING THERETO

I have one further motion. I would like to move for a judgment of acquittal in this particular case. I would like to point out to the Court as we know the charge here is that these defendants conspired together to violate a law of the United States, to-wit, an offense set up under Title 18, Section 2113 of the U. S. Code, specifically they conspired to rob the Union Bank of Berry, located at Berry, [fol. 334] Kentucky, a bank which is insured under the Federal Deposit Insurance Corporation Act.

Now, measuring the testimony which has been given here in the court, it is my understanding that the law on this particular subject is as follows: There must be proof of a conspiracy on the part of these men to commit a crime in violation of the laws of the United States.

Now, there must be as an essential element of this an

unlawful agreement and it must be shown that some time subsequent to this unlawful agreement that one or more of them engaged in some overt act which was designed to carry out the purpose of the conspiracy. The law has been decided in a number of cases, but with respect to a motion for judgment of acquittal, the prosecution, the United States should be given the benefit of all of the evidence. This case here has been attempted to be proven by circumstantial evidence. I am going to request the Court to consider each of the individual defendants as individuals here. Now, the testimony here has shown that certain acts did occur at certain times. Now, there is no question that on December the 10th of 1960, that the defendant Sykes purchased a hand weapon from the Joyce [fol. 335] Gun Shop, however, there is nothing to show that that hand weapon could not be just as useful in robbing a small beer joint located across the street from this federal courthouse, as it would in robbing the federal courthouse or the federal bank. The evidence has demonstrated that some time around January the 18th that certain caps were purchased by the defendant Strunk and that these caps were purchased somewhere in Berlin, Kentucky. It is stated in the indictment that these caps are to be used as part of a disguise, however there has been no proof whatsoever offered along that line; in fact, it is shown that the caps are intact, they were found in the automobile. Thirdly, they have charged as an overt act that Preston and then Sykes by deceit procured an automobile from a used car dealer in Newport, Kentucky, an automobile to be used in the robbery. Now I think that the undisputed evidence shows that the defendant Sykes was a person that was quite well known to Mr. Stricklen, that he loaned him the automobile and possibly the purpose which Sykes advanced was not as truthful as it might be, however Stricklen knew exactly the automobile which was loaned, he knew exactly to whom it was loaned. I don't see that there has been any deceit proven, nor has there been any proof offered that this automobile was [fol. 336] specifically to be used in connection with a robbery.

The next specification relates to the certain evidence

which was found in the automobile, the '55 Buick automobile, which the defendants were picked up in. We have already had some considerable discussion on that.

The next item, the fifth specification, is that on or about January the 8th, of 1961, the defendant Sykes and defendant Strunk were in Berry, Kentucky, for the purpose of observing the bank. Now, I think there has been a total failure of proof as far as this particular overt act is concerned. In fact, the witness testified that he saw a man whom he thought to be the defendant Sykes and he saw another man and he at no time came anywhere near the defendant Strunk, in fact, he thought a little bit about the defendant Preston, but he stated that he wasn't sure.

Now, further examining the proof which has been offered in support of the prosecution's case they have demonstrated these acts or these individual transactions and they have offered two statements which were made by the defendant Sykes subsequent to the time of his arrest. They have also offered certain testimonial evidence which was we might classify generically as unsworn statements by the defendant [fol. 337] Preston made to an FBI agent subsequent to the arrest and they have offered as far as the defendant Strunk is concerned, evidence relating to his conversations with the FBI men, and the court can correct me if I am wrong, but apparently Mr. Strunk didn't know anything about anything except that he did buy two caps in Berlin, Kentucky.

Now, I respectfully submit to the Court that the crime of conspiracy is a peculiar creation of law. It is one that existed in common law before the enactment of the statute. It was specifically codified in Section 371 of Title 18, that sets up certain specific requirements. Because of the nature of a conspiracy or a discussion or an agreement to commit a crime, it is a peculiar child of law and the case law requires that certain basic elements must be proven. You must prove that there is an intent to form a conspiracy or an intent to commit this crime. This is required in the case of *McWorth v. U. S.*, which is reported at 103 Fed. 2d, 495. You must show that subsequent to the agreement on the part of the various parties that one or more of them committed certain unlawful acts. Well, there must be an agreement on the part of the parties. They must sit down and conspire, not

necessarily all of them at one time, but one or two of them [fol. 338] together. You must show by the evidence that they did, in fact, conspire, that they did plan to commit this crime. You must further show that the persons had not absolutely withdrawn or abandoned the enterprise. Now, it is possible that one man—say I were to conspire with my associate, Mr. Elfers, and Mr. Elfers has as his associate Mr. Strunk and we conspire over something and all of a sudden I look at something and I say, "Well, I won't have anything to do with it. I am going to abandon it. I withdraw absolutely." Now, it is possible for me to purge myself to a great degree of guilt by this withdrawal and this matter has been entertained before the courts on a number of occasions and one thing that the court has investigated, particularly the district court, and the Sixth Circuit Court of Appeals has reviewed in the case of *United States v. Polack, et al*, they investigated there whether or not a person had withdrawn from the conspiracy before it proceeded to the point where they were actually committing a crime.

Now, looking at the evidence which we have before this court, what if any evidence, independent evidence do we have of the existence of a conspiracy to commit robbery? Well, we have the confessions. We have these acts, each one of them innocent, even taken as a group, they are still [fol. 339] innocent. They do not tie these defendants to the Union Bank of Berry, at Berry, Kentucky. In fact, the evidence hasn't even shown that these men were down there casing the bank. Assuming it is true that two of these men were down there, the only thing that was said was that they rode by a feed merchant's store twice. They didn't offer in evidence where the bank was or that these men stopped, that they looked in the bank, that they studied it or they obtained any information concerning the bank. The only thing was that they drove past the feed merchant's store on two occasions. Now, I think that the actual element of casing the bank was negated by the testimony of the president of the bank, who was here on the stand. He testified that he had never seen any one of these three men at any time.

I feel there is a total failure of proof there. Now, one witness and only one witness, a man by the name of Monroe,

William Monroe, testified that these men were sitting in a cafe where he is a bartender and they were talking about a big job and he wasn't even sure who was there. I asked him specifically, "Were all three of them there?" "Well," he said, "I believe they were but I wouldn't swear to it." Now, if this is the only thing—we asked him specifically, [fol. 340] "Well, did they talk about Berry, Kentucky?" Well, he didn't know whether they talked about Berry, Kentucky, or not. I asked him, "Were they talking about pulling a robbery or installing a furnace?" and he said it could be either one. He further said that all of the customers that come in there are always talking about big deals of one kind or another.

I submit to the Court that I have carefully listened to this evidence and I have not heard any independent evidence tending to establish that there was a conspiracy on the part of these three men. In fact, the confession which was made by the defendant Sykes indicated that it wasn't these two fellows here that he talked to about it, but it was some other people from somewhere else entirely. For this reason, Your Honor, I feel that there should be a judgment of acquittal.

The Court: On motion for judgment of acquittal, the defense admits the truth of all the evidence offered by the United States. Now, this necessarily must be a case of circumstantial evidence. The United States proved a chain of circumstances here which in the judgment of the court make out a case and should be submitted to the jury. The jury may determine it is not sufficient. The first thing they proved, they find these three men all together in this [fol. 341] automobile, at 3 o'clock in the morning, in Newport, with two loaded revolvers, all of the equipment used for a disguise. They then proved that at least one of the defendants has positively been seen in the town of Berry a short while or day before that time. They proved that one of the defendants, at least, took the trip around and showed exactly what they were going to do and said, "We were going to rob the bank." and gave the names of the other two defendants that were going to assist him in robbing the bank and how they were going to get away and what they expected to do and how they were going to divide the money. They proved by the other defendant, Preston,

that they discussed robbing the bank, he said he wouldn't join them, but he said they discussed robbing the bank at this Depot Cafe; it was discussed right there at that place, robbing the Berry Bank; that Preston and Sykes went to the used car lot of Mr. Stricklen and on the subterfuge obtained possession of an automobile that they never paid for, on an out and out falsehood that they wanted to go to Lexington, that Preston was going to try to buy it and they wanted to take it to Lexington so he could get some money from his lawyer for an accident that he had had with the railroad company, all of which was a pure fabrication, they didn't intend to do anything like that at all. [fol. 342] They proved by Monroe that he heard them talking, these three defendants as he recalls, talking about pulling a job in the Depot Cafe, which corroborates Preston's story that they were there talking about robbing the Berry Bank.

Innumerable cases have been submitted, I believe, on much less circumstances than this case is. Each one of them is shown to have a part in this. Two of them got the car, one of them got the caps. You say there was no circumstance about the caps for use as disguise. One of them told the officers that the reason they cut the caps was so they could pull them down over their heads better and be disguised more and also they wanted to take a razor blade and cut the other two and one protested on that.

It would seem to me that the Court would be going far beyond the law to sustain a motion for a judgment of acquittal on these circumstances which for the sake of the motion are admitted as true. Every one of these defendants had something, contributed to this chain of events according to the evidence. Sykes got the car. It was his car. He bought the car. He confessed, he told everything about the plan, told where they were going, what they were going to do, all of the details, even to [fol. 343] the get-away route. He was also seen and positively identified by Mr. Hutton in Berry, on two occasions, on the same day, under circumstances which caused Mr. Hutton to closely observe them. He purchased a pistol which was found in the car. He traded for another pistol, as he said, which was found in the car, both of them loaded. It would be difficult to say that the jury

should be expected to find him not guilty and enter a judgment of acquittal as to him.

Preston admits that he was with these two men in the cafe, the Depot Cafe, and talked about robbing the Berry Bank. He went with Sykes, who made his complete confession, he went with Sykes and hasn't denied it, it stands uncontradicted, and entered into a deception to secure the car that was to be used in the robbery by telling a complete fabrication. He was not positively identified but Mr. Hutton testified that to his best judgment he was in Berry in that car, the same car that as the record stands he admitted that he helped to obtain under false pretenses.

The defendant Strunk, on the same route that the other defendant says that they were going to take, goes in and buys two caps. So far as the record here goes there is nothing to show—so, you find the caps, the split caps, [fol. 344] and the caps that are not split, pillow case which it is reasonable to infer could be used to hold money, bundles of bills, two loaded pistols, a revolver, stocking disguises, false faces, ropes or cords which could be used for tying somebody up or for tying a sack, an automobile which was obtained by false pretenses and by deception, and these three defendants all together at 3 o'clock in the morning in Newport, Kentucky.

In the light of this evidence I must overrule your motion for a judgment of acquittal.

Mr. Leggett: If the Court please, I would like to direct the Court's attention to the case of Coblen v. United States, which appears at 90 Fed. 2d, page 78. The statement of the court is the conclusion to be drawn from circumstantial evidence of a conspiracy must include every other reasonable hypothesis than that of guilt.

The Court: For your information, that case has been expressly overruled by the Supreme Court.

Mr. Leggett: Thank you, Your Honor. I didn't know that.

[fol. 345] The Court: Let the jury come in Mr. Marshal. Thereupon the proceedings out of the hearing of the jury were concluded.)

The Court: Call your witness, gentlemen.

Mr. Leggett: Robert Fuller.

The Court: Approach the bench.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

The Court: I notice you called another witness before the defendants take the stand. Under our procedure the defendants will have to testify before any other evidence is offered. I thought I should call your attention to that fact. I thought perhaps you might have overlooked it in some way because there might be some question as to their right to testify after some proof.

Mr. Elfers: If we offer one defendant, we can bring on another witness?

The Court: No.

Mr. Elfers: We have to offer all three.

[fol. 346] The Court: I thought I should call your attention to that fact.

Thereupon the Colloquy at the bench ended.)

Mr. Leggett: We will call the defendant John Richard Sykes to the stand.

EVIDENCE FOR THE DEFENDANTS

JOHN RICHARD SYKES, being called as a witness in his own behalf, first being duly sworn, testified as follows:

Direct examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. Will you state your name please?

A. John Richard Sykes.

Q. Where do you reside, Mr. Sykes?

A. 38 Peter Knoli Homes.

Q. What city and state is that?

A. That is Newport, Kentucky, Campbell County.

Q. How old are you?

A. I am 24.

Q. Married?

A. Yes, sir.

[fol. 347] Q. Children? Do you have any children?

A. Yes.

Q. How many?

A. Four.

Q. Four? Will you speak up more clearly, Mr. Sykes?

A. Yes, sir.

Q. You have four children?

A. Yes, sir. Four.

Q. What are their ages?

A. Two, three, six and nine.

Q. What is your occupation, Mr. Sykes?

A. I am a salesman.

Q. You are a salesman?

A. Yes, sir.

Q. For whom?

A. I am laid off right at the present time but I was a salesman for L & S Heating and Air Conditioning.

Q. Where are they located?

A. 2548 Woodburn Avenue, Cincinnati.

[fol. 348] Q. When were you last employed by that firm?

A. Some time in the last of November or the first of December, somewhere in there I started drawing my unemployment.

Q. 1960?

A. Yes, sir.

Q. Have you drawn unemployment from that date?

A. Yes, sir. I was drawing unemployment from that date until the date I was picked up.

Q. How much did you draw per week?

A. Fifty-three dollars per week.

Q. Fifty-three dollars per week?

A. Yes, sir.

Q. While you were working as a salesman, what territory did you cover?

A. All of Greater Cincinnati and all over—well all over. We had went as far as Augusta, Kentucky. We put—

Q. What county is that?

A. Augusta, Kentucky, I really don't know, but it is [fol. 349] way down the river. It is on the other side.

Q. That is Bracken County, isn't it?

A. Well, I don't know for sure.

Q. Do you know what other counties you covered?

A. I imagine it is. Well, all over. We have cleaned

furnaces all over. We usually got 10 or 15 furnaces to clean, then we would take the truck and go to that area.

Q. Did you actually assist in cleaning the furnaces, yourself?

A. No, sir. I sold—well, I did sometimes. It just depended on how the help was. Most of the time I sold the orders for the work to be done.

Q. When you did assist in cleaning these furnaces, what type of clothing did you wear?

A. Well, khaki pants, khaki shirt, just ordinary work clothes, and most usually a work cap of some kind.

Q. Now, after you were laid off in November, did you do any kind of work?

[fol. 350] A. No, sir, none other than look for a job each day and then this Mr. Stricklen asked me—I owed him \$130 and he asked me to—would I take and drive cars around over the city and different parts of the country with signs in them “For Sale” and “For Trade” and with his phone number on them, and that I did and I made a deal or two, but I didn’t write it up because my reading and spelling is not so well.

Q. Now, did he limit the territory over which you could sell these automobiles?

A. No, sir. I went even to Cynthiana a couple of times. There was a guy gave me a man’s address and I went down to see him, but he had moved. He said he was interested in a station wagon.

Q. And what were you to be paid for selling an automobile?

A. He was giving me 25% of the gross price.

Q. Did you sell any automobiles between November 1960 and January 20th, 1961?

A. Well, not directly, sir. What I mean by that is that I didn’t sign the papers. I didn’t write them up. I made the deal, would tell the person, “Well, we will trade for your car and maybe a hundred dollars difference,” and [fol. 351] Stricklen would write the deal up. Then he would give me maybe 10 or 15 dollars and deduct it from my account which I owed him. At the time I started for him, I think I owed him about \$160, something like that.

Q. Where did you attempt to sell these automobiles?

A. All over.

Q. Can you be a little more specific? In Kentucky where did you try to sell these automobiles?

A. Well, for one place, I went to Brooksville and I would stop at these small stores out through there and had this sign in the windows and I would ask the people, "Do you know of anyone that would be interested in trading for maybe a later model car at a wholesale price?" because he had several models that he wanted to get rid of because he wasn't moving them. His other salesman had left him and he didn't have too much business and he was more or less just wanting to move the cars; if he made \$50 on it, it was O. K. I mean it was taking care of his overhead more or less.

Q. So, in attempting to sell these automobiles you were in Augusta, Kentucky, Brooksville, Kentucky, Cynthiana? [fol. 352] A. Well, yes, sir. I was all over. While I was in Brooksville, down there, there was a person that was interested in buying a furnace I had knew about previous, about a year and a half or two years ago when gas went in there and I knew about this person and they said at that time they weren't able to buy the furnace at the time the gas went in and so I called on the people while I was down there and they weren't home and I was back down there another time and evidently they had moved, I don't know where, but—or either they weren't home, one, I don't know, and I never did go back down there. And I was in different places.

Q. Do you have any hobbies, Mr. Sykes?

A. Just fishing. That is about all. Fishing and hunting.

Q. Have you, as we say, "horse-traded" different items?

A. I don't necessarily call that a hobby. I do that for money. I mean that I would make out of it. I mean I trade cars or I will—well, like I own—I have owned several guns at one time.

Q. What kind of guns?

[fol. 353] A. Well, .38's, .32's, .25's—the fact of the business, this one gun right here, this .38, I traded a .25 automatic to that and I have been offered \$85 for the gun since I have had it.

Q. To whom did you trade this .25 automatic for the .38?

A. Elmer Joyce, the fellow they had here on the stand.

Q. Have you made other such trades with Mr. Joyce?

A. Yes, sir. I traded a .32 to him approximately two years ago for a .45 automatic and which I sold the .45 automatic. I think—well, I don't remember exactly what I made off of it, but I think off of that deal I made somewhere in the neighborhood of about \$18 or \$16.

Q. I will ask you if it is unusual for you to have guns in your home,—

A. No.

Q. (continuing)—available for trade or sale?

A. No, sir. Well, at this time I haven't any at home, but at different times I have had as high as five or six at home, being shotguns and pistols also. In think in this [fol. 354] case there were two shotgun shells found which I had just sold the shotgun about four or five days before that to a fellow down in New Richmond, Ohio, at a service station.

Q. Have you ever carried such guns in your automobile before?

A. Yes, sir.

Q. Before—

A. If I could have the permission I could explain this case in my own words.

Q. Well, we will get into that later on. Just answer the question. Is it unusual for you to carry guns in your automobile?

A. Well, no, sir. I have reason to one effect. My life has been threatened and so by that I do carry a loaded gun with me practically all the time, even on my person.

Q. Mr. Sykes, directing your attention to some time in January 1931, were you in the presence of one Kenneth Strunk?

A. Well, I am in his presence I will say at least two or three, sometimes five hours, out of every day or most usually because he either comes to my house or I go over to his and we only live half a square apart.

[fol. 355] Q. Are you related to Mr. Strunk?

A. Yes, sir. Brother-in-laws.

Q. Brother-in-laws?

A. Yes, sir. I married his sister.

Q. Did Mr. Strunk ever accompany you when you were attempting to sell automobiles?

A. Yes, sir, he went with me quite a bit. The fact of

the business, we used the car that I would drive on a day I would try to sell it or driving it around with the sign on it "For Sale", we have used it to go and apply for jobs. He would help me fill out an application.

Q. Were you present when Mr. Strunk purchased two caps?

A. Yes, sir, I was. I told him to purchase the two caps.

Q. Where was that?

A. That was in Berlin, Kentucky.

Q. Do you know approximately what date?

A. Well, I—it was on—I was picked up late Thursday night and it was Thursday during the daytime when he [fol. 356] bought the caps. I was arrested Thursday night.

Q. It was January the 19th?

A. Well, I was arrested the early morning of the 20th, so, yes, it would be—it would be on the 19th when he bought the caps.

Q. What was the occasion for the purchasing of the two work caps?

A. Well, one is I have a cap which—it isn't here and it is all greasy and everything and I usually wear a cap quite a bit and since I wasn't in the furnace work, lack of—well, lay-off and everything, lack of work for the company, I was going to get me a clean cap to wear because I usually wear a cap or a hat and so I told him to get me a work cap and I says, "If they have a baseball cap," I says, "get me a ball cap." And so he bought me two caps.

Q. Would you tell the Court and jury in your own words the circumstances surrounding your arrest?

A. Yes, sir.

Q. At 3 o'clock a. m., on the morning of January 20th, 1961?

A. Yes, sir. Actually, their timing is a little bit wrong [fol. 357] because at that time I was wearing a watch, I was permitted to have one, and I know the exact time. I was parked right in front of the Tropicana Club, which I had been parked for approximately—not five hours—but about two and a half hours, I would say. Now, the reason for me being parked in front of that place was one thing. I had followed my wife's ex-husband to the place and I was waiting for him to come out and the place doesn't close until 3 o'clock or after—the fact of the business the place

has been known to stay open all night—and I was there waiting for him to come out. I was going to whip him.

Now, in this case here they have brought out that my glove compartment was not locked. My glove compartment was locked and my wife—

Q. Now, Mr. Sykes, tell the jury in an orderly fashion what happened while you were parked at Ninth and Monmouth.

A. I was there to whip my wife's ex-husband because he hasn't paid no non-support in five years for two step-children that we have and there was a warrant for him in Newport and I knew there was a warrant for him, so I knew they have neglected to pick him up, so I knew that if I had trouble with him that they would pick him up. [fol. 358] Now, I stated before that my glove compartment was locked. It was locked because of the simple reason that my wife made me—

Q. Now, just a moment. Just a moment. Who was with you at Ninth and Monmouth?

A. Kenneth Strunk and John Preston.

Q. And why were they accompanying you at this particular time?

A. They were with me because that I was going to have trouble out of my wife's ex-husband and that they—they was going to help me if they had any help there. Now, the two loaded revolvers that were in the glove compartment—

Q. Now, just a moment. Then you were parked there waiting for this man to come out of the Club Tropicana?

A. Yes, sir. He was in there.

Q. All right. What happened after that?

A. Well, I was parked there and the guys in the Tropicana are—they were a meeting of a bunch of Newport known gangsters in there, because "Sleep-Out Louie", I know him, and guys of that sort. They were in there and [fol. 359] they were peeping out the door, they were suspicious of me setting there and they called the police. Then the police arrived. Now, Detective Ciafardini that was on the stand here, I know him personal. He denied knowing me because in this case here I am going to prove a brutality.

Q. Now, just a moment. Someone called the police and what happened after that?

A. They come there and they ordered us out of the car and shoved us down. They asked us what we were doing there—I mean Strunk and Preston never said nothing, because of the simple reason as they knew there were two guns in that glove compartment and the reason that they didn't say anything was this, is they were deadly weapons and if I told that man that I was waiting for him to come out, Detective Ciafardini would have booked me with assault with a deadly weapon.

Q. What happened after the Detectives and the Newport police arrived?

A. They shoved us down and they took us down, put us in a cruiser, and took us to the police station.

Q. Did they tell you you were under arrest?

[fol. 360] A. No. They took us to the police station and there they took us on the inside of the police station and I says to Detective Ciafardini, "What is the charge?" and he says, "You are charged with vagrancy." And I says, "Well, you can't prove me guilty of vagrancy because you know I only live two squares down the street. So he took me back in the back, what they call a squad room or something, they took me back there, they took the other two boys on back in another room. There Detective Ciafardini asked me, said, "Sykes, I know you carry a gun. Where is that?" And I says, "I don't have it," and I can prove in this case here the reason that he knew I carried a gun.

Q. Well, what happened after that?

A. So, he says to me, says, "I know you carry a gun. Where is it?" And I says, "I don't have it with me." I said, "It is at home." He says, "We will find out." He said, "That glove compartment is locked, but we will get it open."

Q. How did he know that it was locked?

A. Well, he tried to shake it down right at the place where they picked us up and he asked me for the keys and [fol. 361] there were no keys to the car on my person, they were at home because my wife asked me to leave them at home. She asked me to leave the guns at home. I wouldn't do it, so she asked me to lock the glove compartment in her presence and bring the keys in the house and give them to her.

Q. Do you need a key to drive?

A. No. It is a '55 Buick. As long as it is not turned all the way over to the extreme left, you can drive it without having a key to it.

Q. Did you ask Detective Ciafardini or Detective Quitter or either of the two policemen to go out to your automobile to get you some cigarettes?

A. No, sir. I did not. At that time I had quit smoking and I had been quit smoking for about two months. And I smoke some now because I have been in jail for over two months and it is kindly nerve-racking.

Q. All right. What happened after that?

A. Then he goes out—he stayed in there with me and he sent this little uniformed policeman and the older detective out to the car, along with other uniformed policemen. [fol. 362] There they broke open the car and bring in the two loaded revolvers; one belongs to me personally, it is registered in my name; the other revolver I had only bought it a day or two before, in the Depot Cafe, as they say it come from Red Murphy. Well, I heard through the grapevine that the gun was stole from Red Murphy. I don't know. I bought it for four dollars and the guy was—he was—well, actually I didn't buy it. He pawned it to me, because he wanted to sell it to me for \$10 and I wouldn't take it and he pawned it to me for four.

Q. All right. Then the two guns were brought back into your presence at the police station?

A. Yes, sir.

Q. What happened after that?

A. When they brought the two guns in in my presence, at that time they brought the two guns, they brought the license plate, and they brought those two brand new caps that—that—which is in here (indicating), they brought those two new caps and a pair of cloth gloves which has grease all over them. And they put them on the table and Ciafardini says to me, he says, "Sykes, I am going to clear my books with you," and there he went to work. He went [fol. 363] to work on me and he worked on me for two hours and a half and he stated that to an FBI agent and the FBI agent asked him, said, "Would you like to talk to this man any more?" He said, "No. I worked on him for two hours and a half last night." He beat me with rubber hoses and he kicked me, trying everything he could to

make me sign confessions to robberies of grocery stores, robberies of the West Side Cafe, in Newport, and different robberies that happened in that vicinity that later they charged other guys with that were already in jail.

Q. When were you first interviewed by an agent of the FBI?

A. I was interviewed the next day by four or five FBI agents. Now, they say they interviewed me one at a time. There was five along, at one time, along with four detectives.

Q. What did you tell the Federal Bureau of Investigation agents?

A. I told the Federal Bureau of Investigation what I told the Newport police department was—

Q. Would you repeat exactly what you told them?
[fol. 364] Yes, sir. Previous to all this happening and me getting arrested, I was approached by two guys, I knew them as Chuck and Marvin, in the Depot Cafe.

Q. When was this?

A. It was approximately—I will say it was approximately a week or two before I was picked up.

Q. All right.

A. And by being approached by these guys, they asked me to drive the car for them on a bank robbery, but before they asked me, told me about it. I had previously seen the guys in there and before they told me what it was about, they gave me the whole line-out of it, of the road they were going to travel and everything. Then asked me would I do it and I says, "Well, I will think about it." So I went to Strunk and to Preston, they were in the place—I don't remember whether they were back there in the back or in the front—and I told them that I had a chance to make \$5,000 and one of them says to me, he says, "It must be robbing a bank." Now, which one of them said that I can't recall, but I said to him, I wondered right away if they had been approached by those guys, [fol. 365] I said, "Well, how did you guess?" and so I told them what was said to me and they both says, "You are a fool if you go through with it. We don't want nothing to do with it," and walked away. I knew all of the details on this bank whatsoever and the Newport police department was determined that they would

get me to sign a confession one way or another. They beat me so that—I can prove this—that they made me admit being an ex-convict and I have never served a day in the penitentiary in my life.

Q. What else did you admit to the FBI agents?

A. I told the FBI agents the same thing, that I told the police department, about Chuck and Marvin. Then five days later they come back to me, two FBI agents which Mr. Shipley there is one of them, along with the other that was on this stand, and they say to me, "We want to question you"—before that Detective Ciafardini come in there, and he says to me, "You are going to be called back out for questioning," and he said, "you had better not make a fool out of us in front of the FBI." They took me out there. FBI Shipley and the other FBI that was on the stand here says to me—and I figured I had the same thing in store that I had the first time be-[fol. 366] cause the chief of detectives was there, and he has got a bad record of whipping people and they say he is worse than any of the rest of them, he was there, that is chief of detectives, Leroy Fredericks, I know him, too. And when they came, brought me down to detective headquarters in those presence, FBI Shipley says to me, he says, "Now, look, we quit playing games and we know that there is nobody such as Chuck and Marvin." He says, "They don't exist." I says, "Well, I can't help what your opinion is or what you think. That is all I know." They says, "Kenneth Strunk and Johnny Preston is Chuck and Marvin." Now, if they tell the truth on this stand, they will have to say that they said those very words and then I figured I had the same thing in store as I had the first time, and so I says, "Well, if that is the way you want to believe it, you believe it that way." One says, "Well, Preston was cut all to pieces," and which he was when he went to jail, he was cut up with a knife, and I saved his life, took that gun right there and stood off about 35 people that was cutting on him,—

Q. Now, Mr. Sykes—

A. (continuing)—and—

Q. (continuing)—was that the only discussion that you ever had with the FBI relative to these two defendants?

[fol. 367] A. That is all I told them. I said, "You can believe what you want to," and they said to me, "Well, there is no such a thing as Marvin and Chuck." Says, "It is Strunk and Preston." I said, "Well, you believe what you want to." So they said, "That is them." And they says, "We know that you are scared of Preston. He has a bad record and he is a rough man when it comes to fighting." I said, "I am not scared of Preston or I am not scared of nobody else."

Q. Relative to the first discussion again, with the FBI agent, what if anything did you tell him about a bank robbery?

A. I told him—and the exact words as he produced it up here, about Chuck and Marvin. After being in jail two months, I can't remember it as good as I remembered it then because I had the highways memorized such as they named them off, 1032, Highway 1284, Highway 62, 19, 10, and Highway 1011. The reason I had those highways memorized in one thing, I am well familiar with that part of the country, I have been over those roads numerous times. I was a collector for Morris Sewing Machine Company for three months, which took me all over Kentucky [fol. 368] and the State of Ohio and State of Indiana, and I had a lot of accounts out through that area of Brooksville, Maysville, and in that vicinity, and I knew those highways out through there. That is the same highways though that Chuck and Marvin mentioned to me, so that is the reason I still remember them after two months of being in jail. And so since I don't read and spell so good, I have a better memory than some people for just straight out memorizing.

Q. Now, Mr. Sykes, did you tell—did you relate to Agent Silas anything about the Union Bank at Berry, Kentucky?

A. That is what Chuck and Marvin asked me about. I mean that is the bank that they told me they were going to get \$110,000 out of or something and they wanted me to drive the car for them. And I went back and told them, after I talked to them that night, I went back and told them that I didn't want no part of it, but I—that license plate that I have here, Chester Clark gave me the license plate. He was going out of town and he told me to keep it for him and that license plate, they had took his car away

from him, the police had because he was picked up for drunken driving and destruction of property or something, they took his car and I thought that was a plate [fol. 369] to his car and he told me keep it. I kept the license plate and the two revolvers is mine and those two new caps, those two pair of gloves. That other stuff, where they got it, I don't know, other than this car that I have, the man that previously owned it that traded it to Schott Ford said—told Vince Stricklen and Vince Stricklen told me the same words, he says, "There is merchandise in that car that I want, such as a jack," and I don't remember the other items, but he said, "There are other item in there that I want out when that fender is straightened out to where you can open the trunk."

Q. Was this automobile damaged?

A. Yes, sir. It was damaged to where—the trunk could not be opened. The trunk, part of the deck lid was pushed into with the fender.

Q. Was there any damage to the front or the side of the automobile?

A. No, sir. It was the right rear fender. It was the right rear fender pushed into the trunk. Now, the reason that I bought the car, was that I was in my spare time, me and my brother-in-law was going to get—take the fender off, get one from the junk, paint it, and I bought the car for three and a quarter and right now that same car is [fol. 370] selling for 595.

Q. What color is that automobile?

A. That car is a pea green. It is a light pea green.

Q. It is a solid?

A. It is a solid color. Like this witness that they had on the stand here today has said that I drove a yellow and black car, I have never drove one and I don't think Vince Stricklen has ever had one on that lot that I know of. And I have never been to Berry, Kentucky.

Mr. Elfers: No further questions.

Cross-examination.

By Mr. Jean L. Auxier, United States Attorney:

Q. Mr. Sykes, you say that you got that from Chester Clark (putting license plate in front of witness)?

A. Yes, sir.

Q. Did you know that was in your car?

A. Yes, sir.

Q. Did you put it in the car?

A. Yes, sir, the trunk, though. I put it behind the [fol. 371] front seat.

Q. You mean in the back seat?

A. In between the seats. It is a two-door sedan. Those caps that were laying there were up over the back seat.

Q. Did it have these wire hooks on it when you put it in your car?

A. Yes, sir.

Q. (Handing Government Exhibit 3 to the witness) Did you know that squeezer was in the glove compartment of your car?

A. Yes, sir, I knew both of them was.

Q. Did you know it was loaded?

A. Yes, sir. Knew both of them was loaded.

Q. Did you know that Colt .38 special was in your car?

A. Yes, sir, I knew it was in there.

Q. Did you know it was loaded?

A. Yes, sir.

Q. Who loaded it?

A. I did.

[fol. 372] Q. Who loaded this one (indicating Government Exhibit 3)?

A. I did.

Q. Did you know that blue and white checkered linen cap was in your car?

A. No, sir, because I had never been in the trunk of it. I had just bought the car and the man testified that the trunk can't be opened.

Q. Well, I didn't ask you if that was in the trunk now. I just asked if you knew it was in the car.

A. The officer said it come out of the trunk. I don't know where it come from. It is not mine.

Q. All I wanted you to say was whether you knew it was in the car or not.

A. No, sir, I didn't know.

Q. You didn't know it was in the car?

A. No, sir.

Q. Did you know this cap—this black and white checkered cap—

A. No, sir.

Q. (continuing)—was in your car?

[fol. 373] A. No, sir.

Q. Did you know that this olive-drab—olive green or whatever you call the cap—was in your car?

A. It was up over my back seat.

Q. Well, you do know that it was in the car?

A. Yes, sir.

Q. Did you know that this blue wool baseball cap was in your car?

A. Yes, sir. It was up over my back seat.

Q. Now, do you know whether all four caps were in the same place in your car?

A. No, sir. They couldn't have been because I never seen the other two caps in my life, until they showed them to me at the police station.

Q. Well, did they show them to you?

A. The FBI and the detectives did.

Q. Did they show you all four caps there?

A. Not when I was first arrested that first night. They [fol. 374] only showed me these two here and the license plate and the two guns and a pair of them—that cloth pair of gloves there.

Q. Oh, you had a pair of gloves. Put on the olive drab cap.

A. They took them leather gloves out of my top coat pocket. (Puts on olive drab cap)

Q. What is the matter? Fit tight?

A. No, fits all right. No, I just wear the bill crimped like that.

Q. Fits pretty well?

A. Yes, sir.

Q. Did you tell Strunk what size to buy when he went in—

A. No, sir.

Q. (continuing)—to buy a cap?

A. I wear just a little bit bigger than he does.

Q. You just told him to buy a little bit bigger cap than he wore?

A. Well, he has wore a hat of mine before or a cap or something like that. (Puts on blue wool cap)

[fol. 375] Q. Does the baseball cap fit you?

A. Well, I would say it is just a little bit big, but it is the same size as the other. A little different material.

Q. Try the black and white checkered cap if you will please sir.

A. (Puts cap on)

Q. Can you pull it down farther than that?

A. I guess so.

Q. Let's see how well down you can pull it.

A. (Pulls cap down).

Q. Now, will you be kind enough to try on the blue and white linen cap.

A. (Puts cap on)

Q. Does it come down pretty well?

A. They all fit me about the same I say.

Q. Now, let's see what you say about these pigskin gloves. Are they new gloves?

A. Well, I had had them for a short time. They are [fol. 376] my gloves.

Q. Put them on. Oh, they are your gloves?

A. Yes. They took them out of my top coat pocket.

Q. Did you know they were in your car?

A. They were not in my car. They were in my top coat pocket.

Q. They were not in your car?

A. Because when they got through beating me, parts of my clothes, parts of my suit and different things of mine was scattered all over this room. The fact of the business, I left a lot of blood in that room.

Q. You mean you gathered up—those gloves were gathered up with the blood on the floor, is that the idea?

A. No, sir. Those gloves was taken out of my top coat

pocket when they searched me, when they told me to put everything I had out on the table.

Q. Did you see this article (indicating stocking) on the night you were arrested?

A. No, sir, I didn't.

[fol. 377] Q. Mr. Sykes,—

A. No, sir, I didn't. The first time I saw that was in detective headquarters when Chief Leroy Fredericks was walking around with it on his face, showing it to the FBI agents.

Q. Would you be willing to undertake to put that on your head?

A. Yes, sir, I sure will (putting stocking on over his head).

Q. Well, I would rather you didn't tear it up in the process.

A. I don't think it will go over my head.

Q. Well, it might not.

A. (Pulling stocking down over head and face)

Q. It did go over your head, didn't it?

A. By forcing it, it did.

Q. Did you know that was in your car?

A. It was not in my car, sir.

Q. You are positive that it was not?

[fol. 378] A. Yes, sir.

Q. Now, did you know these gloves were in your car, the white canvas gloves?

A. Yes, sir, they were. Under my front seat.

Q. How is that.

A. Under my front seat.

Q. Under the front seat?

A. Yes, sir. Because I had used them that day to take a trailer hitch off. You notice—see there how they have rust on them (indicating). I took a rusty trailer hitch off, which is in my house right now.

Q. So you had used those gloves and they were yours?

A. Yes, sir.

Q. And you knew they were in the car?

A. They were under my front seat, yes, sir.

Q. Did you know these pillow cases were in your car?

A. No, sir, I don't know where they came from.

Q. Did you know this cord was in your car?

[fol. 379] A. No, sir. I imagine the previous owner of the car would, though. Because since he wanted the stuff out of the trunk, I imagine that it looks to me like he was quite a fisherman.

Q. Well, he fished with short lengths, didn't he?

A. Well, I have used them on trot lines before. I seen a bunch of pieces that he brought out that looks to me like you use them on trot lines.

Q. You think that is a trot line. When did you set out a trot line?

A. Well, when you stretch out a trot line across the river, oh, you use about maybe a little longer lengths.

Q. Oh, you mean drop lines for your hooks?

A. Yes, sir.

Q. So you think you were going fishing?

A. No, sir, I weren't. I didn't know they was in there. The man that owned the car, he will probably admit knowing that was in there.

[fol. 380] Q. Well, I believe you told us you are something of a fisherman, aren't you?

A. Yes, sir.

Q. Is that pretty strong cord?

A. Well, I say it is. It looks like it. I have used about the same thing for trot lines before.

Q. Do you think you could break a couple of strands for us?

A. Well, I am afraid I couldn't break it with my hand, because if I could break it with my hand I wouldn't want to—

Q. You wouldn't want to catch catfish as big as you or it?

A. I wouldn't want to catch a very big catfish on it. He would get away.

Q. That cord is strong enough to make a pretty good tie on a banker's wrist, isn't it?

A. Well, I wouldn't know. I ain't planning to tie strings on no banker's wrists.

Q. It would hold a pretty strong man, wouldn't it?

A. I don't know.

Q. What is your view? You have tried it.

[fol. 381] A. I would say it is pretty strong.

Q. Now, tell us this, on the evening when you were

arrested down there, didn't you see all of this stuff laid out on the table at police headquarters, all of this stuff, every item I have asked you about?

A. No, sir. I sure didn't, but I will say one thing, that is a pretty neat display.

Q. All right. You will agree on that. Now tell us one more thing. Have you ever been convicted of a felony?

A. No, sir, I sure haven't.

Q. Your name is John Richard Sykes, is it not?

A. Yes, sir.

Q. On or about May the 21st, 1956, in Cincinnati, Ohio, were you convicted of carrying a concealed, deadly weapon?

A. Yes, sir.

Mr. Leggett: If Your Honor please, I would like to interject an objection at this point. I would like permission to approach the bench and be heard on it?

[fol. 382] The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

DEFENDANTS' MOTION FOR MISTRIAL AND OVERRULING THEREOF

Mr. Leggett: If the Court please, I would like to move for the withdrawal of the jurors and declaration of a mistrial, on the basis of the impropriety of the question propounded by the United States Attorney. Carrying a concealed weapon is not a felony in Ohio unless it is specifically charged under a felony statute. After asking the man a question whether or not he has been convicted, the District Attorney proceeds to go into his record of misdemeanors; intimating to the jury that the defendant has lied on the stand under oath. I feel this is highly prejudicial.

The Court: I don't understand. You say that carrying a concealed deadly weapon is not a felony in the State of Ohio.

Mr. Leggett: It has never been a felony until 1960. It is a decision of the Court of Appeals of Cleveland when they determined it was an indictable offense. Prior to that time it has been a misdemeanor punishable by municipal [fol. 383] court in Cincinnati, under municipal ordinance,

30 days in jail and a hundred dollars fine until in July of 1960 a decision of the Court of Appeals required prosecution for carrying a concealed weapon as a felony. It definitely is a misdemeanor:

The Court: This was in 1956?

Mr. Leggett: Yes, Your Honor. I think if we have the FBI record, it will disclose if it was not municipal court, it was not in the Court of Common Pleas.

Mr. Auxier: My information is that it is a felony, but—

Mr. Leggett: Do you have the FBI record so we can check and see?

Mr. Meade: We did have the FBI check to see whether or not it was a felony. I called them and they said it was.

You are stating to me professionally that it was not?

Mr. Leggett: It was not until 1960.

The Court: It was not in '56.

Mr. Auxier: In that connection, if it is one of these things that the court determines, then the court—

[fol. 384] The Court: Well, if it can be, it doesn't make any difference. You can charge with a misdemeanor or felony, but if it is, a felony is an offense for which he might be sent to the penitentiary.

Mr. Leggett: But charged with a misdemeanor—I will say this, there was a statute on the books in 1956 under which a person could be convicted of a felony, but there were no prosecutions as a felony, it was always prosecuted under municipal ordinance.

The Court: That would be just a matter of preference of the prosecuting officer as to what kind of charge he wanted to make, but if he could be sent to the penitentiary, that would be a felony.

Mr. Leggett: But the question is whether he was convicted of a felony.

The Court: Convicted of the charge.

Mr. Leggett: If he is convicted of the charge, then he is convicted of a misdemeanor.

The Court: I will overrule your motion. I will admonish the jury not to consider the statement. I don't know whether he was convicted of a felony or not. I don't know. Overrule the motion.

[fol. 385] (Thereupon the colloquy at the bench ended.)

The Court: Members of the jury, the question arises as to whether or not this defendant has been convicted of a felony and the District Attorney has asked a question about his conviction for an offense which was stated in the question. You are instructed that on the statement of the defendant that he has not been convicted of a felony, that you will not consider the question asked by the District Attorney. It is not determined here whether or not that offense would be a felony or not a felony in the State of Ohio or what the charge was against him. He says that he has not been convicted of a felony and you will have to accept his statement of that and not consider the question of the District Attorney. It is entirely without your consideration.

Is that all?

Mr. Auxier: Just a moment, if Your Honor please.

(Reporter's note: There was a short pause in the proceedings.)

Mr. Auxier: That is our cross-examination.

The Court: Stand aside.

Call your next witness.

[fol. 386] A Juror: I didn't quite understand one part of Mr. Sykes, where he said that he had gone to Brooksville. Did he say he went to Brooksville to sell a furnace because a new gas line had gone through?

The Court: Is that what you said?

The Defendant Sykes: No, no, ma'am, I was talking about Augusta. It went through two years ago and that is where the gas line was mentioned.

KENNETH RAY STRUNK, being called as a witness in his own behalf, first being duly sworn, testified as follows:

Direct examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. State your full name.

A. Kenneth Ray Strunk.

Q. Now, where do you reside, Mr. Strunk?

A. At 114 Peter Noll Homes, in Newport, Kentucky!

Q. How long have you lived in Newport, Kentucky?

A. I believe I moved there November the 16th, 1960.

[fol. 387] Q. And where did you live before then?

A. I lived at 610 Lexington Avenue, in Newport, Kentucky.

Q. How long altogether have you lived in Newport, not at any particular address, but in Newport?

A. Approximately two years.

Q. Are you a native here in Northern Kentucky?

A. I have lived in Cincinnati and Newport since 1947.

Q. Before then where did you live?

A. I am from Stearns, Kentucky, in McCreary County.

Q. Are you married, sir?

A. Yes, sir, I am.

Q. And how many children do you have?

A. Two.

Q. Are they living at home with your wife?

A. Yes, they are.

[fol. 388] Q. Are you presently employed?

A. No, sir, I am not.

Q. Do you have an occupation?

A. Yes, I do.

Q. What is that occupation?

A. I am a furnace mechanic and installer.

Q. Were you employed prior to January the 20th, 1961?

A. I was laid off in April, about around the first of April, in '59.

Q. April of '59?

A. Yes, sir.

Q. And have you been employed at any time between April of 1959 and January 1961?

A. No, sir. I looked for a job and couldn't find employment until about the last of June, '59, or maybe July, and I couldn't find any work so I signed up for unemployment compensation, which was granted, and I drew that unemployment compensation completely out, every bit of it.

Q. Now, have you been employed doing any odd jobs or have you had any other source of income during this period of time?

[fol. 389] A. Well, the unemployment compensation ran

out in November, the last of November, and after that I did a few odd jobs for my people, my aunts and—

Q. November of what year?

A. This past year, 1960.

Q. 1960?

A. I believe I have the date wrong as to when I was laid off, the year.

Q. How well are you acquainted with the defendant Sykes?

A. John Sykes is my brother-in-law. He is married to my sister, Elizabeth.

Q. How long have you known him?

A. I have known him since—I guess, the summer of 1956.

Q. Now, do the two of you bum around together or have you bummed around together for any period of time?

A. We do, as you say, "bum around" together quite a bit. We have.

Q. Were you ever employed at the same employer?

A. No. He is in the furnace business, but he worked [fol. 390] for a different company. I believe he worked for L. & S. Heating Company and I worked for Rybolt Heating Company.

Q. How long have you been acquainted with the defendant Preston?

A. Not very long. I think the last of December, maybe either just before or just after Christmas. It wasn't very long at all before we were arrested.

Q. And where did you meet the defendant Preston?

A. At the Depot Cafe in Covington.

Q. The Depot Cafe in Covington?

A. Yes, sir.

Q. Who introduced you to him?

A. I don't believe there was an actual introduction. I was just there with my brother-in-law, John Sykes, and his name I think was called as John or Johnny or referred to as Johnny Preston, and there wasn't any actual introduction other than I just got to know him, you know by conversation, that he and Sykes had and other people in there. There wasn't any actual introduction as to, "Mr. Strunk, [fol. 391] this is Mr. Preston." There wasn't any formal introduction. I just—

Q. Did you have occasion to, shall we say "go around" with Preston to amount to anything?

A. Not very much. We were in the same company maybe once or twice. I am not positive about that, but it wasn't very much at all. I think I did take him to the hospital from the Depot Cafe. He had to go back for some kind of treatment on his hand where he had had a stab wound or a cut of some kind and I believe I drove him down there.

Q. Now, when you first met him was this before or after he had these cuts on his hand?

A. It was before, before that he—

Q. Were you present at the time he received the cuts?

A. Yes, sir. I was.

Q. Will you tell the Court and jury approximately how many times you met with and associated with the defendant Preston before the 20th day of January, 1961?

A. Not very much. I would see him in the Depot Cafe and speak to him, say, "Hello", or "How are you?" or something to that effect. And he has bought me a glass [fol. 392] of beer or a bottle of beer and I have exchanged the favor and actually, to actually talk to him, I haven't talked to him very much prior to the 20th.

Q. Mr. Strunk, I am going to ask you whether you were in Berry, Kentucky, on January the 8th of 1961?

A. No, sir, I was not.

Q. Have you ever been in Berry, Kentucky?

A. Not to my knowledge, I haven't.

Q. Do you know where Berry, Kentucky, is?

A. I do now, from—since the case has come up, I do know where it is.

Q. Well, before this case did you have any idea where it was?

A. No, I did not. None whatsoever.

Q. Where were you on January the 8th, 1961?

A. Well, I was at the movies. I took my kids and went to the show. My step-daughter's birthday is the 4th of January and I have been unemployed and my unemployment [fol. 393] went run out and the extension didn't go through and I didn't have any money that week, very much, or very little money, and I promised the kids that I would take them to the show as a birthday present for my daughter.

Q. Whereabouts are these movies located?

A. In Newport, Kentucky.

Q. In Newport, Kentucky. You were at the movie in Newport, Kentucky, on January the 8th, is that right?

A. Yes, sir, I was.

Q. And where else were you on January the 8th?

A. Well, I guess—I don't know. I slept kind of late, it was Sunday morning and I usually sleep late on Sunday and I got up about 10:30 or 11 and I had breakfast and I went up to my sister's house, Mrs. Sykes, and stayed for awhile and I came back. I told my wife to get the kids ready, I would take them to the movies. This was in the afternoon, I don't know, between 1 and 3 o'clock possibly, and I set around the house and watched television until my wife got the kids ready. Then I took them to the movies and we stayed, perhaps three hours or something like that. [fol. 394] Q. And where did you go if anywhere on the evening of January the 8th?

A. I don't—I think my mother had come over and I don't remember if I went back up to my sister's or not, but I didn't go—I didn't go any place that I particularly remember.

Q. Let me ask you, were you in the presence of the defendant Preston on the evening of January the 8th?

A. Not as I recall. I could possibly have been but I don't remember it.

Q. Now, I will ask you to state whether or not you at any time conferred with anybody here in Northern Kentucky or elsewhere, plotting to rob any bank anywhere?

A. No, I didn't. I did not plot any bank robbery or any other kind of plot. I did—I was approached by Mr. Sykes, John Sykes, he said Preston and I were in the Depot Cafe but I—

Q. Let me ask you this first. Now, when were you approached by Mr. Sykes?

A. I don't remember the exact date, but I don't believe it was Sunday the 8th.

Q. Where were you when he approached you?

[fol. 395] A. Preston and I were in the back room of the Depot Cafe and we had either a glass of beer or a coke or something, anyway we had a drink, and John came back and said, "I have the opportunity to make \$5,000," and he usually is noted for fabulous stories and fantastic tales

and so forth, so I just dismissed the idea as something else he had dreamed up. That is how—I was disinterested, to be exact.

Q. Now, did he propose to you that you and he would engage in this nefarious scheme?

A. No, sir, he did not. He said, "I have the opportunity to make five"—I believe the number was five thousand dollars—and I said, "John, I don't even want to hear about it. I just don't want to discuss anything like that. You must be going to rob some place or something like that. I don't even want to hear anything about it. I don't want to be involved one way or the other. It is probably just something else that you have dreamed up, a wild tale or something like that."

Q. Now, since January the 20th, have you learned what that plan to make \$5,000 was?

A. Apparently it was to rob the bank of Berry, at Berry, Kentucky.

[fol. 396] Q. I will ask you to state whether or not you and he and Preston at any time discussed escape routes from Berry, Kentucky, or the Union Bank, at Berry, Kentucky?

A. No, sir, we definitely did not.

Q. Mr. Strunk, after you were arrested on the 20th day of January, 1961, you were questioned with relation to certain materials which were allegedly found in the automobile of your brother-in-law, is that correct?

A. On the 20th of January, I was questioned, not very extensively. The Newport police called me from a cell and said, "We would like to talk to you," and, "Have a seat, if you will." And I said, "Certainly." I sat down and he said, "Well, what is your side of the story?" I said, "Well, what story?" And he said, "Well, there is"—the story.

Q. Now, for our purposes, you were questioned, is that right?

A. Yes, sir.

Q. And specifically, did they question you about this merchandise here that you see, these government exhibits? [fol. 397] A. No, they did not.

Q. I will ask you to state whether or not at any time they presented to you this cap which—this blue wool cap—

I think it has been specifically identified and this olive drab work cap. Did they present those to you at any time?

A. No, sir, they did not.

Q. Did the FBI agents ever present to you these two caps and ask you could you identify them?

A. The second time they talked to me they did show me the caps and the revolvers.

Q. I will ask you to state whether or not at that time you identified those two caps.

A. I definitely did. I said they are familiar—"I am familiar with the caps. I bought those caps for John Sykes."

Q. And which FBI agents did you make that statement to?

A. To Mr. Shipley and another agent, I don't know his name. I think he was here and testified.

Q. Is that Mr. Silas, the tall fellow with the dark hair? [fol. 398] A. I think so, yes.

Q. Now, will you tell the Court and jury the approximate date that you purchased those two caps which you see in front of you, part of Government's Exhibit No. 1?

A. I believe it was on the 18th or the 19th. It was a day or two before we were arrested.

Q. Of what month and year?

A. January 1961.

Q. And where was it you purchased them?

A. I know now where—what the name of the store is and the town, but at the time I didn't know, but I do know now that it was in Berlin, Kentucky.

Q. And the gentleman you purchased them from was the gentleman who appeared here as a witness in this court?

A. Yes, he was.

Q. And what was your purpose in purchasing these caps?

A. I bought those caps for John Sykes.

[fol. 399] Q. Who else was with you if anyone on this particular day?

A. There was no one except Sykes and myself.

Q. And what kind of car did you have?

A. We were driving a 1955 Buick.

Q. And what color was this 1955 Buick?

A. Green, I believe, a light green.

Q. What time of day was it that you purchased these caps?

A. It was in the afternoon, around 2 o'clock I believe.

Q. What time that day had you originally met the defendant Sykes?

A. About 10 or 11 o'clock, I think he came down to my house and asked me would I go for a ride with him. I said, "Sure, I will go," and so we went out.

Q. About 10 or 11 o'clock?

A. Yes, sir.

Q. Now, I assume that you agreed to take a ride with [fol. 400] him?

A. Yes, yes, I did.

Q. Then where did you go and how did you get there?

A. Well, we—we had—we went to—down through Falmouth, Kentucky, south of Falmouth and turned up one of those roads. He said something about going to a town or going through a town to see a used car lot or stopping some place to sell—try to wholesale a car for Mr. Stricklen.

Q. Do you know what roads you actually traveled on?

A. No, I do not.

Q. Do you have driver's license?

A. Yes, sir. Yes, I do.

Q. Do you drive very often?

A. Quite a bit.

Q. About how long were you riding that day?

A. I don't know. I don't know exactly. I know that we drove down into Kentucky, around Falmouth, and drove through two or three little small towns and we came back and it was in the evening, maybe 4 o'clock or around supper-time I will say, I am not positive as to the time.

[fol. 401] Q. After you left Berlin, Kentucky, where you purchased these hats, do you know the road you were traveling on?

A. No. I know Highway 27, but I don't know the road that we were on before.

Q. You left Berlin and somehow picked up Highway 27, is that correct?

A. Yes, sir. We left Berlin going—I would think it would be south, anyway we—when we got to Highway 27 we turned to the right and continued back to Newport.

Q. Did you pass through Falmouth, Kentucky, again on your way back to Newport that day?

A. Yes, we did.

Q. Then apparently, you almost retraced your route, your previous route?

A. Well, we came back the same way we went. We went to—to the turnoff and John said, "Turn off here. This is the way I want to go,"—to Brooksville, I believe he said. Anyway, we went through several small towns, two or three and we didn't see—I didn't see any used car lots, any auto lots, and he did not stop and ask anybody. The only time that we stopped was when I stopped to get—I [fol. 402] stopped for a bar of candy, two bars of candy, and a bottle of pop, that I purchased at the general store where I bought the caps and as I was getting out of the car, John asked me, said, "If they have any shop caps in there,"—said, "That is a country store. If they have any old work caps or shop caps in there, you know what I mean, get me one and if they are reasonably priced, get me two of them." He said, "If they are cheap, get me two," and so he handed me \$2 and I took the \$2 and went into the store. I bought two bars of candy and a bottle of pop and then I went over, I asked the man, "Do you have any shop caps?" and he said, "Yes, we do." And I went over and looked at this assortment and I bought these two caps here (indicating), the blue one and the drab colored cap, and he asked me, he said, "You look very familiar to me, young man." And I said, "I don't see why." I said, "I am not from this part of the country."

Q. Mr. Strunk, this is interesting, but I don't think it is demonstrating—we had a witness on the stand and he described what was said in there at the time. When you returned from Berlin, Kentucky, about what time of evening was it you got back?

A. I would say around 4 o'clock.

Q. Now, could you pinpoint the day of the week that [fol. 403] took place?

A. As I say, I believe it was the 18th or the 19th of January, 1961.

Q. Now, what did you do when you returned to Newport?

A. Well, I went home and then I went back up to John's.

He just lives a short distance from where I live. And he asked me if I would put some locks on the doors of his house and I said I would. He is not very handy with tools or anything. I said, "Sure I will." He said, "If you want to put a night lock on our door, I will buy the night locks and you can put one on yours and one on mine." So—

Q. Now, Mr. Strunk, on this particular day, what type of car were you operating? You said it was a Buick?

A. A Buick.

Q. Do you know whose automobile that was on that particular day?

A. Well, I know that it belonged to the Sixth Street Fill Auto Sales.

Q. I will ask you to state if you know whether or not your brother-in-law purchased that car.

[fol. 404] A. Yes, he purchased the car about 7 or 8 o'clock, I don't know the exact time; that same night after I had fixed the locks on the doors, why we went over to the car lot and he bought the car.

Q. That was on the 18th?

A. The 18th or the 19th. I am not positive as to the date.

Q. But he bought it on the same day that you were down in Kentucky, is that it?

A. Yes, he did.

Q. I will ask you to state whether or not the defendant Preston was with you on that particular occasion.

A. No, he was not.

Q. When did you first see the defendant Preston on the evening that you were arrested?

A. John came by the house and got me and we went over and that—we went over to the car lot. He paid—I think he gave Vince \$150. I don't know the exact amount of money but I believe that is what it was, and he called Preston from the car lot if I am not mistaken, that is where he called him, and we went over and picked up John Preston in Covington where he lives.

Q. You had not seen him previously that day, is that [fol. 405] correct?

A. No, no, I had not.

Mr. Leggett: You may inquire.

Cross-examination.

By Mr. Jean L. Auxier, United States Attorney:

Q. Would you mind to put on this olive drab cap for us?

A. (Puts on cap)

Q. Comes pretty near to fitting?

A. Just about.

Q. Would you mind trying on the blue flannel?

A. This is a slight bit large (putting on blue cap).

Q. You can put it on?

A. Oh, yes.

Q. Can pull it down even farther than you have it?

A. That is just about as far as it will go.

Q. Now, would you try this black and white plaid or checkered cap.

A. (Puts black and white cap on)

Q. Pull it down on your head pretty well.

[fol. 406] A. That is as far as it goes. It is a pretty good fit.

Q. Pretty fair fit, is it?

A. Yes, it is.

Q. Now, will you try this blue and white checkered linen cap.

A. (Puts on blue and white cap)

Q. Does that fit you fairly well?

A. Pretty good.

Q. Mr. Strunk, did you ever see this .32 squeezer before?

A. I have seen a similar weapon. I don't know if it would be this one or not. This is a—looks like an old make, squeeze handle, .32 revolver. I haven't seen this one. I couldn't say definitely if I had seen it or not. I have seen guns similar to this, this same make and model.

Q. You have seen other guns of that sort?

A. Of this nature, yes, I have.

Q. With the—let's see—that has the old type—that has the old type latch that presses down instead of lifts up.
[fol. 407] So it is an old squeezer.

A. It looks to be an old squeezer.

Q. Now, tell us this, did your brother-in-law have an old model .32 squeezer in the glove compartment in the car in which you were arrested?

A. I don't know if he did or not. I didn't see any weapons prior to the arrest, none whatsoever. I do know that John does carry a gun and sometimes there is more than one gun either in his car or on him.

Q. Did you ever see that snub-nosed Colt special?

A. Several times.

Q. Often enough that you could say that you are acquainted with the gun?

A. I couldn't say that I am. Belongs to my brother-in-law, John Sykes. He purchased it at the Elmer Joyce Gun Shop and, in fact, I was the one that took the handles off and there was a little ring here where I think this is a military—

Q. A little lanyard loop?

A. There is a little metal ring here and I took the handles off and took the loop out of it for him. He is not very handy with tools at all. He asked me to do that so I took [fol. 408] the loop out of it, but this is definitely his gun. I recognize this as being his.

Q. Did you know that was in the glove compartment of the car in which you were arrested?

A. No, I cannot say that I did know it was in the glove compartment, but I know that John Sykes hardly ever goes out of the house or goes any place at all without some sort of weapon, a gun of some kind. His life has been threatened more times than one. In fact, I will have to say that my sister's first husband has made the statement to me that if he and Sykes ever run together that there was going to be trouble and he would probably have to shoot John Sykes, which I did tell John.

Q. You think they don't like each other?

A. I am definitely sure that they don't.

Q. Did you ever see that before (showing license tag to witness)?

A. No, sir. I have never seen this, other than when the FBI showed me this.

Q. When did the FBI show you that?

A. I think they either showed it to me or mentioned it.

[fol. 409] Q. Well now, there is a difference. Could you tell us whether you have seen it before?

A. I can't be positive, if I have seen the license tag. The

license tag has been mentioned to me before, but I don't recall seeing it other than in the court.

Q. Well, your best judgment is that you never saw that license tag before?

A. I can't testify as to ever having seen the license plate or not. I know I have heard of the license plate before. It has been mentioned to me before.

Q. You mean that particular license plate has been mentioned to you before?

A. It is not necessarily this particular license plate—a license plate that was found with the caps and the—

Q. Oh, you mean that was found in the car?

A. I don't know where it was found. It was found according to the FBI and the police, but I don't know where it was found.

[fol. 410] Q. Well, I think you are telling us that you didn't know there was such a license tag as that. You didn't necessarily then know that such a license tag was in the automobile where you were arrested?

A. As far as knowing of the license tag and knowing that it was in the automobile, when I was arrested, I did not. I have knowledge of a license tag. I have either seen it through the FBI or I have been told about it. There has been a lot of questioning and things get a little vague after you go over a certain story time and time again. I know of the license tag, but I don't know if I have seen it or if it was from conversation.

Q. How much now of the matter about which you have been testifying on direct and cross-examination here is vague in your mind?

A. It is not to say "vague;" you just go over the details so much that you get—there are so many of them, you get them confused. I do. I am not accustomed to all this questioning and procedure.

Q. Well now, there isn't any reason why you wouldn't remember this particular day, is there?

A. Which particular day?

[fol. 411] Q. The day of this arrest.

A. No. I remember it.

Q. What about the day you bought the caps?

A. I remember the day I bought the caps, but I don't remember the exact date.

Q. You don't know how you got to Berlin?

A. Yes, I know that it was off to the left, off of Highway 27 to the left.

Q. What route?

A. I do not know. Off of Highway 27. I don't know the route. I didn't observe that.

Q. That map will tell you it is to the left if you are going south on Highway 27, but which route did you turn off on?

A. I don't know the route.

Q. Did you follow the route outlined in red on that map?

A. I have seen the map, but I haven't observed it closely.

Q. What is your judgment about that? Did you follow that route in getting to Berlin?

A. The only thing that I can testify to is that I went [fol. 412] south of Falmouth, Kentucky, with John Sykes, we turned left off of Highway 27, followed some route which I do not know the number of, we bought—I bought those two caps and brought them back and gave them to him in the car.

Q. Now, was that a Buick car?

A. Yes, sir, it was a Buick car.

Q. Was that the Buick car that your co-defendant, Mr. Preston, had got that day from the Sixth Street Auto Market, or whatever you call it, on the pretext of going to Lexington to collect money on a damage suit against the railroad?

A. I don't know if it was or not, because I have never been to the Sixth Street Auto Sales with John Preston. I have been there numerous times with my brother-in-law, John Sykes. In fact, I bought a car from the Sixth Street Fill Auto Sales myself.

Q. Do you know if that automobile you were using on that day came from that auto lot?

A. I assume that it did. I don't know for sure. John said he was going over to Vince's to take a car to see if he could try to sell it. We have gone down there several times.

Q. Going to whom?

[fols. 413-414] A. Vince Stricklen's Auto Sales. It is the same as Sixth Street Fill. I know him well enough to call him Vince. I have been in there several times. In fact, he offered me the same proposition that he offered Sykes. "If you wish to take a car out with the phone number on

it and 'For Sale' and paste a couple of cardboard or paste-board in the window with the phone number and 'For Sale' on it, anything that you can sell it for, 25% of the gross profit will be yours."

Q. Did this car have such a sign on it on this day?

A. The Buick?

Q. Yeah.

A. No, I don't believe it did.

The Court: Mr. Auxier, apparently we will not be able to finish this case this afternoon and will have to come back tomorrow. So I will interrupt this examination.

Mr. Auxier: Yes, it is just as well.

The Court: Because you want to examine him further. There is no point in going on longer when we have to come back tomorrow morning.

[fol. 415] (Reporter's note: The court recessed until 9:30 a.m., the following day, to-wit, March 18, 1961, at which time all the defendants were present with counsel, the jurors were called by the clerk and all answered present, and the following occurred):

The Court: Now, I believe the defendant Strunk was on the stand under cross-examination.

Come around.

You had not completed your cross-examination, had you, Mr. Auxier?

Mr. Auxier: We had not.

The Court: Very well, come around.

(Reporter's note: The defendant Kenneth Ray Strunk, resumed the witness stand, and having previously been sworn, testified further as follows:

Cross-examination Cont.

By Mr. Jean L. Auxier, United States Attorney:

Q. Mr. Strunk, in our cross-examination yesterday, we were discussing some of these items in the pillow case which make up the government's exhibits in this case. And I believe you had tried on each of these two caps?

[fol. 416] A. Yes, sir. That's correct.

Q. Now, at the time you bought those caps, did you tell us that you knew you were in Berlin, Kentucky?

A. No, sir. I didn't know I was in Berlin, Kentucky. I knew that—the FBI agent asked me where that I purchased the caps and I told him that it was in a small grocery store somewhere south of Falmouth, Kentucky, but the name of the town I didn't recall at the time.

Q. And you didn't know the highway by which you reached that town?

A. No, sir. I did not, other than U. S. Highway 27, we turned off of U. S. Highway 27 on to a smaller road.

Q. Who was driving at the time?

A. I was driving the car.

Q. How far had you driven the car on that day?

A. I had driven it.

Q. Where did you take charge of it?

A. I believe when I got in, I started driving. He doesn't like to drive and usually when we go any place I usually [fol. 417] drive.

Q. Are you a pretty skillful driver?

A. Average I would say.

Q. Now, at that time were you employed? Did you have a job?

A. No, sir. I had—the last employment I had was April 1960 and I had drawn six months unemployment compensation and I couldn't find work and since my unemployment ran out in November and—November 1960—and since that time my mother has helped me financially with the rent and groceries and so forth.

Q. So you didn't have a job?

A. No, sir, I did not.

Q. Now, your brother-in-law, John Sykes, is it?

A. Yes, sir.

Q. Did he have a job?

A. No, I don't think so.

Q. Now, do we understand you to say that Mr. Preston was not along on that occasion?

A. He was not.

Q. Is he the young man who has an artificial leg?

[fol. 418] A. Yes, he is.

Q. Is he the young man who went to the witness Stricklen that morning or the evening before and got the automobile for the purpose of making a trip to Lexington on that day to see his lawyer?

A. I don't know if he was or not. I wasn't along at the time. I couldn't say.

Q. You don't know anything about that?

A. No, sir.

Q. And you don't know whether he was employed at the time or not?

A. No, sir.

Q. You were seeing him around the Depot Cafe at that time?

A. I had seen him in the Depot Cafe, yes.

Q. Was he employed according to your information at the time?

A. I don't know whether he was employed. I didn't inquire as to his employment. I don't know whether he was or not.

Q. Did you ever see these articles before (handing leather gloves to witness)?

[fol. 419] A. They look like John Sykes' dress gloves. I imagine there are several pairs of the same description. I most probably have seen them. They look quite a bit like the gloves he had, dress gloves.

Q. Do you see any blood on those?

A. No, sir, I don't.

Q. Do you recall when you first talked to the FBI agents about this case?

A. Yes, sir, I do.

Q. When was that?

A. I believe it was the 20th of January, in the morning.

Q. That would be, I take it, the same morning that you all were arrested?

A. Yes, sir.

Q. Since you were arrested in the early morning hours before daylight?

A. Yes, sir.

Q. In the forenoon of January 20th?

A. We were arrested about 3 o'clock, I imagine, and it was in the morning. I don't know. I didn't have a watch and they don't tell you the time in there. I didn't know [fol. 420] exactly what time it was. I felt it was morning, though.

Q. Your best judgment it was in the forenoon?

A. Yes, sir.

Q. Did you talk to the agents about this material in the car?

A. They asked me if I knew of any plot or plan or scheme to commit a robbery and if I knew John Sykes and John Preston and several other people which I didn't know any other people except Sykes and Preston and just incidental questions that I answered readily and they didn't ask me anything about any of the stuff until the second time they talked to me.

Q. When was the second time?

A. I believe it was about five days after the first questioning.

Q. Now, tell us this. When they first talked to you and asked you about these caps, did you tell the agent of the FBI that you had no idea about them or where they came from?

A. I said—they asked me, "have you ever seen these caps"—those two that you have in your hand—I said, "Yes, sir. I bought those caps." I looked at them and said, "Yes, [fol. 421] I bought them, and I bought them for John Sykes. What he intended to do with them, I do not know."

Q. You tell us then that you did not deny on your first interview with the agents of the FBI that you knew these caps or that you had anything to do with procuring them?

A. No, sir. I didn't deny it and I didn't say that I had any knowledge of the caps. They didn't ask me about it and I didn't make any statement whatsoever to the caps. No.

body brought the caps up to me. I didn't know anything about them at the time.

Q. Oh! Let's see, what you are telling us then, is that no caps were mentioned in the first interview?

A. The first interview, to the best of my knowledge, those caps—I was not asked about those caps. The second time I talked to them they showed me the caps. I said, "Yes, sir, I bought those."

Q. Now, on the first interview were you asked anything about any of this material? You have seen it out here, haven't you?

A. Yes, sir. I have seen the material.

[fol. 422] Q. The string, did you have any string on your person?

A. No, sir, I did not.

Q. You were not—in your first interview, you tell us—asked anything about any of this material that has been displayed here as evidence?

A. I can't say exactly to that. They asked about John Sykes, John Preston and an attempted plot to rob some one or some bank or something like that, they could possibly have asked me about that. I don't remember.

Q. Let's get somewhere then. Are you now saying that you don't remember whether you were asked about this material or not in the first interview?

A. It is possible that the FBI agents could have asked me about the material. I don't remember.

Q. I see. And it is possible that you could have told them that you didn't know anything about these caps and had never seen or heard of them before, is that correct?

A. No, sir.

Q. Is that possible?

[fol. 423]. A. Those caps, when they were presented to me, they asked me about them, I readily admitted buying those caps for my brother-in-law, John Sykes, and he said, "Why did you buy the caps? Why didn't he go and buy them himself?" I said, "Well, if you knew John Sykes as well as I know him, that he is the type of person that doesn't usually do anything for himself if somebody else can do it. He was a rather lazy person anyway. I was going in the store anyway to get a bottle of pop and candy bar and he said, 'Buy

them' and I brought them back and gave them to him and what he did with them after that I don't know."

Q. Now, let me ask you this. Let's stretch your memory as best you can please. When you finally admitted that you had bought the caps was when the agents had gone and interviewed the gentleman at Berlin and told you what you had done, what you had said in that store, and then you admitted buying the caps and not before?

A. When he asked me about the caps he showed me the caps and said, "Have you ever seen these?" or words similar to that. And I said, "Yes, sir." I didn't deny it whatsoever. I readily admitted buying the caps.

[fol. 424] Q. Was that the first interview or the second?

A. That was the second time that he showed me the caps.

Q. Now, your best judgment is, that nobody asked you about any of this stuff on the first interview you had with the FBI?

A. I don't know for sure if they asked me. They didn't ask me specifically about any. It could possibly—

Q. Did they ask you generally.

A. They could have.

Mr. Leggett: If the Court please. I am going to interpose an objection. Counsel is arguing with the witness. We have gone over it again and again, with respect to the first interview.

Mr. Auxier: I think we have, Your Honor. I don't see we are getting anywhere with it.

The Court: He has the witness on cross-examination. I overrule the objection.

Mr. Auxier: That is our cross-examination.

The Court: Call your next witness.

[fol. 425] JOHN BRENTON PRESTON, being called as a witness in his own behalf, first being duly sworn, testified as follows:

Direct-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. State your full name.

A. John Brenton Preston.

Q. Where do you live?

A. 239 Riverside Drive, Covington.

Q. How long have you lived here in Covington?

A. You mean prior to my arrest or altogether.

Q. Prior to your arrest.

A. About three weeks or four weeks.

Q. And before that where did you live?

A. I was in Florence, Kentucky, working for a construction firm.

Q. Where is your home, Mr. Preston?

A. Originally from Harlan and Salyersville, Kentucky.

[fol. 426] **Q. And have you spent most of your life in Kentucky?**

A. Most of it, yes, the bulk of it.

Q. How old are you, sir?

A. Twenty-eight.

Q. Are you married?

A. Yes, sir.

Q. Where does your wife live?

A. She is living with her parents in Marion, Ohio.

Q. Do you have any children?

A. Yes, I have two children and one expected some time this month or early next month.

Q. Mr. Preston, when did you first meet the defendants Sykes and Strunk?

A. I can't recall the precise date, but it was approximately the first part of January of this year,—

Q. Do you recall—

A. (continuing)—of '60—'61.

Q. —which one of these persons you met first?

[fol. 427] **A. John Sykes.**

Q. And where did you meet Mr. Sykes?

A. In the Depot Cafe.

Q. The Depot Cafe?

A. In Covington.

Q. Where is that located?

A. On Pike Street, in Covington.

Q. Will you tell the Court what the nature of your original meeting with this defendant was?

A. Well, I was playing my harmonica—I am supposed to be an accomplished musician—he came over and told me that he liked my style of music very much and one thing led to another and we told each other our names and so forth and where we were from.

Q. Now, I will ask you to state if you recall when you first met the defendant Strunk.

A. Along the same general time, in the same place, but I can't recall whether it was the same day or a different day.

Q. Had you ever known either of these two men last year or any time previous to January of this year?

[fol. 428] A. No, sir. And I had never heard of them, either.

Q. What is your occupation?

A. Most of the time when I can find construction work, that is what I do. Other times I am a musician.

Q. I will ask you to state whether or not you were employed during the first part of January of 1961?

A. Yes, sir, I was.

Q. Where?

A. I was tending bar out on Taylor Mill Pike—I mean Three L Highway.

Q. On the Three L Highway?

A. Yes.

Q. What was the name of the establishment you were working for?

A. The Alpha Club. I had only been there a short time previous to being laid off in December by this construction firm, Parrish and Hinkle, of Paris, Kentucky.

Q. Now, I am going to direct your attention to the eighth day of January, 1961, in the evening. I am going to ask you whether or not anything unusual occurred on that date.
[fol. 429] A. Not on that day. I was home with my sister

and brother-in-law, right outside of Independence, Bristol Road.

Q. Did you have occasion to be in the Chicken Roost Cafe on or about that date?

A. No. This was on the 7th when I was there, the night of the 7th.

Q. On the night of the 7th?

A. On the night of the 7th, and the next day I was home.

Q. Did anything unusual occur on that particular evening?

A. On the 7th?

Q. Yes.

A. Yes, sir. I got in a fight with a fellow and was stabbed eight times.

Q. After the fight was over, where were you taken?

A. Mr. Sykes took me to Booth Hospital that same night.

Q. What if anything was done with respect to your wounds?

A. They kept me overnight and treated me and released [fol. 430] me the early morning of the 8th, when my sisters picked me up and took me to their place.

Q. I will ask you to state to the Court and jury the physical location and the seriousness of the wounds which you received.

A. All right. There was one wound on my leg here (indicating). I have a tremendous scar down there. And it required about six stitches to the best of my knowledge. There was one there (indicating), there was one right here, as you probably can see, and one on my finger, and five around my heart and right here (indicating), which I have scars there now. I was in bad shape and could hardly walk.

Q. Now, following this incident on the 7th of January, were you able to get around easily?

A. No, sir. No, sir.

Q. How—

A. As a matter of fact, I could hardly walk.

Q. How were you able to get around?

A. You mean propel myself?

Q. Yes.

A. Either by cane or crutches.

[fol. 431] Q. And how long were you compelled to use these aids?

A. Approximately two weeks off and on. Sometimes I could get around fairly well when I had occasion to go anywhere without the aid of crutches and other times I sat around without them and I didn't need them at that particular time.

Q. Now, during this period of time immediately following January the 7th, 1961, were you able to carry on your duties as a bartender?

A. No, sir.

Q. What if anything did you do as far as your subsistence was concerned? Did you work any place or how did you get any money?

A. I stayed with a friend who was—who had me a job in Cincinnati, Kenny Strange, I stayed with his mother for approximately—well, I don't know exactly how long I stayed with her, but I stayed with her until I was—until my physical condition was such that it would permit me to go to work, to go to work in Cincinnati. He is foreman over there in a plant.

Q. During this period of time, did you have occasion to be in the Depot Cafe in Covington frequently?

[fol. 432] A. Not frequently, but I was in there.

Q. On the occasions that you were in the Depot Cafe, did you see John Sykes in there?

A. Yes.

Q. And did you see Mr. Strunk here in there?

A. Yes.

Q. Did you have conversations with them?

A. Several times.

Q. I will ask you to state whether or not at any time during January of 1961, whether you had occasion to be in the City of Berry, Kentucky?

A. No, sir. I have never been in Berry, Kentucky.

Q. Do you know where Berry, Kentucky, is located?

A. I do now. I didn't before I was incarcerated.

Q. I will ask you to state whether or not at any of the times that you met with Strunk and Sykes, whether in the Depot Cafe or elsewhere whether you discussed and planned [fol. 433] with them any robbery of the Union Bank, which is located in Berry, Kentucky.

A. I was approached by Mr. Sykes. I was approached and that is about all. There was a preliminary discussion.

It would—the possibilities of robbing a bank proved to our satisfaction to be unworthy, we did not ever make any agreement to go rob a bank and neither did we discuss it any farther after Strunk got up and left and said he didn't want to hear any more about it.

Q. Now, do you—

A. (continuing) And that terminated the discussion then and for ever.

Q. Do you recall specifically when this conversation took place?

A. Not specifically but generally, around the 12th of January or 13th, perhaps.

Q. Did Sykes ask you to participate with him in carrying out this bank robbery?

A. No, sir. He asked my personal opinion of it—Strunk and I—combined opinion, as to it, as to whether or not it would be advisable. Do you want me to go into detail?

Q. I would like for you to describe it as specifically as you can; the conversation, if you recall the exact statements which were made.

[fol. 434] A. Well, the words were a little vague to my memory now, but I do recall something of this nature. John Sykes approached Strunk and I, said he had a chance to make a great deal of money—I think he stated specifically \$5,000—and that he wanted our opinion as to whether or not he should go through with it and Strunk spoke up and said, "Well, if you are going to make \$5,000, you must be going to rob a bank," and Mr. Sykes said, "Well, how did you know?" He said, "Well, you just don't make money like that without robbing a bank these days," and he said, "If you"—Strunk said, "If you even consider it any further, you are a fool and I don't want to hear any more about it," and he left the table.

Q. Then did you stay there and have a further conversation with Sykes?

A. Not in regard to the bank.

Q. Was this alleged bank job ever discussed again between you and Sykes?

A. No, sir. Never.

Q. I would like to direct your attention to approximately the 17th day of January, 1961. I will ask you to state

whether or not you had occasion to be in the vicinity of the Sixth Street Fill Auto Sales.

A. Yes, sir. It was on the 16th, though, the best of my [fol. 435] memory serves me.

Q. January the 16th?

A. January 16th. I can't be sure. January the 16th or 17th.

Q. What was your purpose in going to the Sixth Street Auto Sales?

A. John had asked me to help him get a car from Vince Stricklen for the purpose of going and taking four soldiers to Fort Campbell, Kentucky. He said that he had been offered a flat rate between 50 or 60 dollars, I forget which, to take them to Fort Campbell. Now, John had did me numerous favors in the past, when I was unemployed he gave me a little money here and there and other small, minor favors and I felt obliged as one pal to another to reciprocate and return the favor.

Q. Did you go to the Sixth Street Fill Auto Sales and obtain an automobile?

A. Yes, we did.

Q. What kind of car was it?

A. I think it was a '55 Buick.

Q. Do you recall what color that Buick was?

A. Yes. Green.

Q. Was that the same car which you were subsequently [fol. 436] arrested in, in the City of Newport, Kentucky, on January the 20th?

A. Yes. Same car.

Q. I will ask you to state whether or not you had occasion to take a trip with Sykes at any time in that automobile.

A. No, sir. I never did take a trip with him.

Q. I will ask you to state whether or not he was with you on January the 16th, at the time you obtained the car from Mr. Stricklen.

A. Just John Sykes and I, alone, was there.

Q. After you obtained the car, where did you go?

A. I think he dropped me off at 229 Riverside Drive, to the best of my knowledge.

Q. On that particular day were you using any crutches or cane or anything?

A. No, not on that day. As I stated, I could get around but it was a physical effort.

Q. Directing your attention to the 19th day of January, 1961, I will ask you to state approximately what time of day it was when you first saw the defendant Sykes?

[fol. 437] A. Some time after dark. He had phoned me from some place and asked if we wanted to go out and get some sandwiches. There was a scarcity of food in that apartment where I was, so we went out and got some sandwiches.

Q. So, it was on the evening of the 19th?

A. Yes, sir. It was on the evening of the 19th.

Q. Did you see him at any time during the day of the 19th?

A. No. That was the first time I had seen him on that day.

Q. I will ask you to state where you went when you first saw him in the evening.

A. We got the sandwiches first and Mr. Strunk suggested that we go to Cincinnati and get some papers and John said, "Well, I want to see a person over there, anyway," and we went over and so we did. We rode around quite awhile in Cincinnati and came back to Newport.

Q. Was Mr. Strunk with Mr. Sykes when you first saw him that evening?

[fol. 438] A. Yes, but at that time I only knew him as "Ray." I had known his last name at that time, but I had forgotten it.

Q. How long did you remain with Sykes and Strunk on that evening?

A. Approximately six hours, six or seven, somewhere in that neighborhood.

Q. Did you know that Mr. Sykes was carrying any loaded weapons with him?

A. No, sir, I did not.

Q. Did you have occasion to open the glove compartment of that Buick?

A. Not on that particular date, no.

Q. Will you tell the Court and jury exactly what you did

in the City of Newport on the late evening of January 19th and the early morning of January 20th?

A. We were parked on Monmouth Street.

Q. Where?

A. Around the 9th or 10th block.

Q. Where on Monmouth Street?

A. Around the 9th or 10th block. I am not familiar with [fol. 439] the geographical layout of Newport, but it was in that general vicinity.

Q. What time of day was it when you originally arrived at that spot on Monmouth Street?

A. About midnight or shortly thereafter.

Q. And how long did you remain there?

A. Until the police apprehended us, around 3 o'clock or—

Q. Did you ever at any time leave that parking spot and go any place?

A. Yes, sir. I went to make a phone call down at a place—I think the Mecca Cafe—about a half a block from there.

Q. Did the car remain there in that parking place all during the course of that evening?

A. So far as I know it did.

Q. Whose idea was it to park there?

A. Mr. Sykes.

Q. Did he tell you what his purpose was in remaining there?

A. Yes.

[fol. 440] Q. Will you state to the Court and jury what that purpose was?

A. Well, Strunk and I were interested in getting employment from a guy who allegedly owns trucks or has a truck. Anyway, he was in a position, a favorable position to get Mr. Strunk and I employment, so Sykes had told us that he would talk to him. Now, he might stand a chance of getting us a job with him.

Q. Was this man an acquaintance of yours and Strunk's or was he an acquaintance of Sykes?

A. He was an acquaintance of Sykes only so far as I gather, not of mine, certainly not.

Q. Who was it told you he was in a position to give you employment?

A. John Sykes.

Q. Mr. Preston, I will hand you this checkered cap and ask you to state whether or not you have ever seen that cap before.

A. Not only this, sir, I have never seen any of that stuff. I have seen it numerous times here, yesterday. Except those gloves, I recognize those as John Sykes' gloves.

Q. You have seen those gloves?

[fol. 441] A. Yes, sir. I have worn those gloves.

Q. And where did you see them?

A. In his overcoat pocket and in his car up over the sun visor.

Q. I will direct your attention to this blue, wool cap and to this khaki colored cap. Have you ever seen those before?

A. No, sir. I have never seen those caps.

Q. Did the police officers show you this—these caps and these pillow cases and this other merchandise which we have here, at the time that you were held?

A. The Newport police did.

Q. The Newport police did?

A. Yes. They showed it to me.

Q. Then your statement is not accurate that you have never seen them before?

A. Oh, yes, I have seen them at the Newport police station when they showed them to me.

Q. Now, before you saw these things at the Newport police station, did you ever see them?

[fol. 442] A. No, sir.

Q. I will hand you this Kentucky license plate and I will ask you to state whether or not you have ever seen that before.

A. I can't say that I have seen this one. I saw a license plate in the rear seat of John's car. Whether it was that one or not, I don't know. It was blue. That is all I can describe it.

Q. I will direct your attention to these metal hangers on here and ask you to state whether or not you have ever seen these before.

A. No, sir. I have never seen those. If that is the same license plate that was in his car, it could theoretically have been on there, but I don't remember the license plate ex-

cept I noticed one in there and it was blue, but wired I didn't notice.

Q. Are you acquainted with one Chester Clark?

A. I know him when I see him.

Q. How long have you been acquainted with him?

A. Prior to my arrest, about a week, two weeks.

Q. Where did you have occasion to meet him?

[fol. 443] A. In—right outside of the Depot Cafe, on Pike Street.

Q. I will ask you to state who introduced you to Mr. Clark.

A. No one. He just walked up and started talking to me. People are very—have a very friendly nature over there. It doesn't take a formal introduction to get you acquainted with someone.

Q. That is more or less a family or a neighborhood type tavern, is that correct?

A. I imagine it would be. Everyone is friendly enough. That is why I frequented the place the few times I was there.

Q. Mr. Preston, when and where did you first meet Chester Clark?

A. When and where?

Q. Yes.

A. I can't say when, but like I told you just a moment ago, it was around a week, two weeks, a week and a half, outside the Depot Cafe, either outside or just outside the door, in that vicinity, but I know it was in the Depot Cafe.

Q. Had you ever met him before January 1961?

[fol. 444] A. No, sir.

Q. Mr. Preston, I will ask you to state whether or not you have been convicted of a felony.

A. Yes.

Mr. Leggett: You may inquire.

The Court: Members of the jury,—

A. (continuing) A long time ago.

The Court: (continuing)—the fact that this defendant says he has heretofore been convicted of a felony will not be considered by you as having any bearing whatsoever on his guilt or innocence on the offense for which he is now

on trial. It may be considered by you, if considered by you at all, only for affecting his credibility as a witness, if you do believe it does affect his credibility as a witness, but for no other purpose whatsoever.

Cross-examination.

By Mr. Jean L. Auxier, United States Attorney:

Q. Mr. Preston, on the day that you were arrested, where were your crutches?

A. Where was what, sir?

[fol. 445] Q. Where were your crutches? You said you went on crutches for two weeks after.

A. I said approximately two weeks. I didn't need them at that time. My wound had healed sufficiently.

Q. Beg pardon?

A. I said my wound had healed sufficiently for me to propel myself without crutches.

Q. Where were the crutches?

A. I threw them into the Ohio River. I lived on the river, just about 50 feet from the Ohio River, and I whizzed them in there.

Q. Handy, wasn't it. When did you grow the mustache you are wearing now?

A. While I was in jail.

Q. That was after the 20th of January?

A. Yes, sir. It was afterwards.

Q. Did you go with the defendant Sykes to Fort Campbell to take these soldiers on a trip, you said?

A. No, sir. I didn't go but I had planned to with him.

Q. How is that?

[fol. 446] A. I had planned to go with him.

Q. You had planned to go?

A. But he told me the soldiers were drunk and I didn't like to fool around with any drunks, I mean to that extent, if they were drunk.

Q. Did you know that John Sykes was going to take a load of drunk soldiers down in the country when you got his car for him?

A. Yes, sir. I knew he was going to take them down there.

Q. Then you did get that car?

A. Yes, sir, I helped him get the car.

Q. Now, do you tell us that you do not know what was done with that car the next day?

A. The next day when, sir?

Q. The next day after—were you there in the evening to get it to make the arrangements to go early that morning?

A. It was some time that day. I can't say whether it was in the evening or in the morning.

Q. Well, did you go with that car the next day?

[fol. 447] A. No, sir, I did not.

Q. Did you see it the next day?

A. No, sir.

Q. Then you don't know whether he took the drunk soldiers or not, do you?

A. Well, no, I don't know whether he took them down there.

Q. And you don't know whether he went down to rob the Berry Bank or not, do you?

A. No, sir, I don't.

Q. But you talked to the other two boys, the defendants with you here, about robbing the Berry Bank?

A. We did not talk about us robbing it.

Q. In the Depot Cafe, didn't you?

A. The place wasn't brought up, the exact location of the Berry Bank was not brought up at that particular time, the site, the location of it.

Q. At which particular time was it brought up?

A. I didn't know a thing about where the location was until we were questioned by the Federal agents over there, [fol. 448] I think around the 20th of January, they named the location then,—

Q. You mean you didn't—

A. (continuing)—to me.

Q. You mean you didn't know what bank this robbery involved until after you were arrested?

A. Yes, sir. They told me.

Q. And you got the car?

A. I did not get the car. I helped him obtain it.

Q. Oh, I see.

A. I am not even sure whether he got it. When I left the place, John I believe took me over in a white '56 Chevrolet, took me back to my home.

Q. Did you make that cut in the back of that cap?

A. No, sir, I did not.

Q. Did you make the cut in that cap?

A. No, sir.

Q. When you were arrested, did you have a razor on your person?

A. Yes, sir.

[fol. 449] Q. When you were arrested did you have some of this cord on your person?

A. Yes, I had a piece of cord but it was not that one.

Q. Which one was it?

A. It was that big, thick one there. The officer identified: I had that big thick one, yes.

Q. You had this window cord or whatever you call it?

A. I had taken it out of Sykes' car. I wanted to take—tie up some newspapers over where I was. They had a bunch of newspapers in the floor. Get them up off the floor. I like a little cleanliness.

Q. And it takes a little cord to have a little cleanliness. Had it ever occurred to you that you could handle newspapers some other way or do you always carry a cord around with you?

A. No, sir, I don't always carry a cord around with me.

Q. So it was unusual for you to be carrying a cord in your pocket on the night of January the 20th, the morning of January the 20th?

A. I used to do a lot of fishing and I used to carry cords [fol. 450] around with me, fish hooks and sinkers and all. Of course, that is not a fishing line.

Q. Did you fish with that kind of line?

A. No.

Q. Did you know this Colt pistol was in that car?

A. Not at that time, no, sir.

Q. Not at what time?

A. The night we were picked up. I knew John had a gun and I think that is it. I am pretty sure it is, because I had seen it in there before. When he opened the dashboard once I saw it in there. I did not handle it or anything.

Q. You are sure that is John's gun?

A. No, I am not sure.

Q. Is it your best opinion that is John's gun?

A. To the best of my knowledge that is his gun. I saw it from a distance from sitting in the seat.

Q. A distance, sitting in the seat. Well, where was the [fol. 451] gun?

A. On the dashboard, in the glove compartment of the dashboard.

Q. Well, the distance you are talking about is the distance that a man could reach?

A. I could not look at it and identify it from that distance because guns look pretty much the same to me. I am not familiar with them.

Q. Well, you think it is John's gun, that is your best judgment about it, but you didn't know it was in the dash?

A. No, sir.

Q. That night?

A. No, sir, I did not know it was in the dash when we were apprehended.

Q. Did you ever see that gun before the night you were arrested (showing witness the other pistol)?

A. I can't be sure I have ever seen that gun. I saw one like it.

Q. Where did you see it?

A. In the Depot Cafe.

Q. Did you ever see this gun in the Depot Cafe (indicating the other pistol)?

[fol. 452] A. No, sir.

Q. Did you go up on the night you were arrested to way-lay John Sykes'—whatever kind of relative his wife's first husband would be?

A. I knew nothing of his wife's first husband. I didn't know his wife had been married before.

Q. You didn't go along then to protect him or keep him out of trouble or something like that?

A. No, sir, I did not go along to protect him or anyone else. I realize I am under oath, I am not going to perjure myself. I went there for the purpose I have previously outlined, to see a fellow about obtaining work because I needed work.

Q. You went there to get a job?

A. That's right.

Q. You didn't know—where were you sitting in that car?

A. The back seat.

Q. Where were you sitting when the officers came up?

A. When they came up there, I was sitting in the back seat. I had been sitting in the front before I went down [fol. 453] to make the phone call. When I came back, I got in the back seat.

Q. When you drove up there, where were you sitting?

A. Front seat.

Q. All three of you?

A. I think so.

Q. How long had you been in that front seat when you were arrested?

A. I wasn't in the front seat when I was arrested. I have told you I was in the back seat.

Q. How long had you been in that car when you were arrested on that day?

A. About six hours altogether. From the time they picked me up at Riverside Drive, to the time when we were apprehended.

Q. And you had no idea that within the reach of your arm in that glove compartment there were two loaded revolvers?

A. How could I know it? I had seen the gun in there previously. This one right there, to the best of my knowledge that is it (indicating Exhibit 2). I did not know that it was in [fol. 454] there at that time. I might have assumed it could be in there, but that is none of my business. I thought John was a constable, as I have told the defense counsel.

Q. Well, you are telling us then that you were in that car and part of the time in the front seat for a period of six hours?

A. No, sir.

Q. And had no idea that there were two loaded pistols in the glove compartment?

A. I could testify that that glove compartment was locked at all times because whenever he wanted—whenever he had occasion to go in there, if he did, I mean in the past, not just on that particular day, he would unlock it.

Q. Well, I would be more interested on this particular day.

A. I didn't see him go in there on this particular day. He had no occasion to the best of my knowledge to open that glove compartment.

Q. So, you don't know whether it was locked or not, do you?

A. I assume it was.

Q. You don't know?

A. He had it locked on previous occasions.

[fol. 455] Q. You are not here telling this jury that you know that glove compartment was locked that night, do you—are you?

A. To the best of my knowledge, no, I don't know whether it was.

Q. Well, all right. Did you have any band-aids on your person when you were arrested?

A. Yes, sir. I had a almost complete box and I also had them all over my body, too. I carried a band-aid for that purpose. I have a wound down there that kept breaking open and kept bleeding. I had to have some means of suppressing it.

Q. What is this article on this piece of stocking right there (indicating)?

A. That is a band-aid.

Q. Did you ever see that before this trial?

A. At the police station.

Q. Oh, that was brought in the police station. When was that—when from the time you were arrested was that shown to you at the police station?

A. Approximately 20 minutes later.

[fol. 456] Q. Immediately after the arrest?

A. Immediately afterward, when they brought me down and knocked me out of the chair and broke open my wound and then wouldn't let me see a doctor for a week and a half.

Q. You suffered considerably, did you?

A. You better believe I did, sir.

Q. Lost a lot of blood?

A. They broke five stitches in my leg.

Q. How long did the wound bleed?

A. How long did it bleed?

Q. Yeah.

A. I don't know how long it bled.

Q. Well—

A. We had some clean rags up there and I tried to stop it the best I could for awhile. It didn't bleed long, no.

Q. Well, a great, big wound?

A. But it got infected, sir. It got infected.

[fol. 457] Q. Infection is one thing and bleeding is another. What we are trying to find out right now is how long your wound bled there when you were so brutally mistreated.

A. It stoppèd early the same morning.

Q. It stoppèd bleeding the same day. Would you say you lost as much as two gallons of blood?

A. No, sir, I would not. I doubt if I lost a half-pint actually.

Q. Certainly it was less than one gallon?

A. Yes, sir. Considerably less.

Q. In fact, it might not have been any blood lost?

A. It might not have, but there was—there was blood spilled all over that place, not only from me.

Q. Oh, there was a whole lot of blood?

A. There was a whole lot of blood—on clothes, too, which [fol. 458] we have.

Q. Well, then, you remember pretty well everything that happened there?

A. I was not drinking. I certainly do remember.

Q. Do you know what those are? (Showing bullets to the witness)

A. They are pistol shells.

Q. What kind?

A. .32, Smith and Wesson.

Q. Which one of these guns do they fit?

A. That .32.

Q. You mean the squeezer?

A. Pardon?

Q. You mean the squeezer?

A. If that is a .32, these will fit it.

Q. But you didn't see the squeezer that night?

A. Yes, sir, I saw that squeezer that night at the police station.

Q. Did you see it before you came to the police station?

[fol. 459] A. No, sir. I saw one like it in Red Murphy's saloon, but not before.

Q. That night?

A. Pardon?

Q. That night you saw the .32 squeezer in the—

A. Oh, no. That was—

Q. Is that the Depot Cafe you are talking about?

A. No. A couple of weeks before we were arrested, I saw a gun like that. I can't say it is the same gun. There is a vague resemblance.

Q. How much resemblance was it? Was it this type?

A. Yes, it broke down like that.

Q. Was it the squeeze handle Smith and Wesson?

A. I don't know. It broke down—

Q. Just the break-down of the gun, is that all you know?

A. A small, break-down gun that resembled that.

[fol. 460] Q. Yeah. Did you know any of this other cord was in that car?

A. No, I did not.

Q. Did you know that this black box was in this car?

A. I saw that black box, yesterday, for the first time, the first time in my life.

Q. When you talked to Chester Clark, did he tell you anything about a license plate?

A. Nothing at all.

Q. What did you talk to him about?

A. I don't remember the topic of our discussion. It didn't pertain to license plates, though.

Q. Did it pertain to banks?

A. No, sir. It did not pertain to banks. It was more in the nature of just routine, a routine discussion.

Q. What are these hooks made out of?

A. What are they made of?

Q. Yeah.

A. They are made out of wire, looks like a coat hanger [fol. 461] wire.

Q. Are you pretty handy with tools?

A. No, sir. I am not a mechanic. I have no knowledge of tools. A musician wouldn't usually be.

Q. Did you make those hooks?

A. No, sir, I did not.

Q. Did you put those hooks on that license tag?

A. No, sir, I did not.

Q. Did the license tag when you saw it in the car have these hooks on it?

A. I can't be sure. I just caught a vague glimpse of a license plate, a bluish license plate. I can't say that it is that same plate. I don't know.

Q. Would you be kind enough to fit this checkered blue and white cap on your head?

A. (Puts cap on)

Q. Is that as far down as it will come?

A. Yes, sir, it is.

Q. If it hadn't been split in the back, it wouldn't come [fol. 462] down on your head at all, would it?

A. It probably would not.

Q. Do you remember when you were helping your friend Mr. Sykes to get this automobile just what the story was you told to Mr. Stricklen?

A. Yes, sir. I told him I had a suit pending against the Erie Railroad, in Lexington, Kentucky, and I was to see a lawyer, I was to receive a sum of money, which I had in reality received in the past but in a different location.

Q. How is that now?

A. I told him—I told Mr. Stricklen—

Q. You say you have in the past? Do you mean that you had a suit or still have a suit against some railroad company?

A. Yes, sir.

Q. Is the suit pending?

A. No. It was settled some time ago.

Q. How long ago?

A. In 1957.

Q. All right. Now, go ahead and tell us just what you told [fol. 463] Mr. Stricklen.

A. All right. We wanted to borrow the auto to take the soldiers to Fort Campbell, Kentucky. I figured that the best way for him to get that auto was to resort to ruse and a slight fabrication. I told him that—I told Mr. Stricklen, rather, that I would probably buy the automobile from him if I could go to Lexington and settle up with my attorney, or words to that effect. It was a very short story.

Q. And it worked?

A. I don't know. I think it did.

Q. How is that?

A. I don't know. I think it did.

Q. You think it did.

A. We didn't leave there in that car.

Q. Why did you tell Mr. Stricklen that you were going to

have a lot of money and if you got the money you were going to probably buy the automobile?

A. Because I was planning to get a loan from my brother. He is a master sergeant in the U. S. Army and he has told [fol. 464] me that if any time I needed money to let him know. I was, in fact, planning to borrow money from my brother, as soon as I had obtained his address from my mother.

Q. So you were going to get a lot of money?

A. Pardon?

Q. You were—

Mr. Elfers: Objection.

Q. You were going to get a lot of money, you say?

The Court: Overruled.

A. I did not. I don't know.

Q. You were actually going to get a lot of money, you were going to borrow a lot of money?

A. Yes, sir. Enough to get me an automobile.

Q. So you weren't misleading Mr. Stricklen?

A. Indirectly I was misleading him, yes.

Q. You were indirectly?

[fol. 465] A. I was going to try to buy the auto.

Q. You are in position now to tell this jury that when you told Mr. Stricklen that you expected to have a lot of money, you thought you were going to have a lot of money, soon, aren't you?

A. But from my brother.

Q. So that much is true. Did Mr. Sykes attempt to tell Mr. Stricklen that he was going to get a lot of money, too?

A. No, sir, he did not.

Q. That he had a lot of relatives, with a whole lot of money, in poor health, who were going to leave him a lot of money?

A. Only two weeks ago, my brother bought a \$13,000 home. I can get money from him if I want it.

Q. What about Mr. Strunk, was he—did he ever tell Mr. Stricklen any story about getting a lot of money?

A. He wasn't along at the time Sykes and I approached him.

Q. At the time you got the Buick?

[fol. 466] A. I didn't say we got the Buick. I don't know whether he got the Buick or not.

Q. You don't? You have no idea whether that Buick was furnished by Mr. Stricklen? Well, you went there in an effort to get it, didn't you?

A. That's right.

Q. And you talked about that particular car and if you got the money you expected to get, you told Mr. Stricklen that you might buy that very car?

A. I did not. I told him I was interested in a '56 Chevrolet, a white '56 Chevrolet.

Q. I see.

A. As a matter of fact,—may I add this—John Sykes and I even took a short spin in that same automobile, that white '56 Chevrolet. We took about a three or four-minute drive in it. We tried it out.

Q. What about the green Buick? Was it there, too?

A. Was it there?

Q. Yeah.

A. I think it was.

Q. I think it was.

[fol. 467] A. We didn't try to get any special car, just a car.

Q. Just any car. One car would do just about as well as another for the purpose you had in mind?

A. I didn't have the purpose that John Sykes had. I never agreed to go with him to Fort Campbell. That was his plan to take the soldiers down there, not mine. I did tell him that I might go along. When he told me that the soldiers were very drunk, I wasn't interested.

Q. And when he went on the night of the 19th to park on the street, when he went to beat up his brother-in-law, you went along to get a job?

A. I didn't know he was going to beat his brother-in-law up.

Q. No, it is not a brother-in-law. Let's see. I will have to figure that one out. It is the ex-husband of his wife that he intended to beat up.

A. That is what he said. I didn't say that, sir.

Q. Now, had he told you anything about that before?

[fol. 468] A. No, sir. As I have testified earlier, I didn't

—I didn't know his wife had a first husband, another husband.

Q. Now, when you were talking to the FBI on one occasion, didn't you tell the agents that four men had talked to you about robbing the bank?

A. No. I said I had been approached by one man in the behalf of two or three others. In their behalf.

Q. Well, I guess there were four men in it after all, weren't there?

A. I didn't never tell him that I discussed it with four men.

Q. Who were those men?

A. Who were the men?

Q. Yes.

A. Well, there was a fellow named Chuck and Marvin—I do not know the name—Mr. Sykes is acquainted with them, not me.

Q. Oh, did Mr. Sykes talk to them instead of you?

A. He had been with these people there in that same place.

Q. Well, you have given us two men. Who were the other [fol. 469] two? You say there were four men in it?

A. There was Chuck and Marvin Somebody and there was John Sykes, who had approached Mr. Strunk and I about it.

Q. So you say Sykes is one of the four men then—

A. No.

Q. —who discussed the bank robbery?

A. He approached us. Sykes never did agree to go rob a bank and neither did—in my earshot at least, did anyone else. It was discussed and completely abandoned when Strunk said that he wanted nothing to do with it.

Q. Now, on the 27th—

A. (continuing) I was in no condition to do anything like that, anyway.

Q. Now, on the 27th of January, did you tell the agents that a plan was discussed involving four men robbing a bank, but you would go to prison before you would tell who was involved?

A. That's right. I did say that.

[fol. 470] Mr. Auxier: All right.

A. (continuing) I said I would go to prison before I would name any names.

Mr. Auxier: That is all.

The Court: Stand aside. Call your next witness.

VIRGINIA SEARCY, being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. Will you state your name please?

A. Virginia Searcy.

Q. Where do you reside, Ma'am?

A. 229 Riverside Drive, in Covington.

Q. And how long have you lived there?

A. Four years.

Q. What is your occupation?

A. Housewife. And I take care of those apartment buildings, three of them down there.

[fol. 471] Q. You are the caretaker of the apartment building there?

A. Yes, sir.

Q. Do you know either of the three defendants seated on my right?

A. Yes, I know Johnny Preston.

Q. How long have you known Mr. Preston?

A. Well, personally, not too long. I knew him through a son of mine. He was in service with one of my sons and they were at Breckinridge together and overseas together.

Q. Where were they overseas?

A. Korea.

Q. Who is Mr. Preston here? Would you identify him?

A. In the tan shirt, sweat shirt, curly hair.

Q. Now, when did you first make the acquaintance of Mr. Preston?

A. Well, I talked—to talk with him personally, was just

about 10 days before he was picked up, to really know him. I mean I knew him but not too good.

[fol. 472] Q. Was he actually living in the building?

A. He was staying with me. He—this boy of mine—he was hurt. You know he had infection in the foot and in the hand. This boy of mine told him, "Go down to Mom. She is just like an old mother hen. She will do something for you," which I did.

Q. To the best of your knowledge, this was a period, say between January the 7th and January the 20th?

A. Well, the day he left was the day he got picked up, that he went out, because he left that morning and said, "I am going to get a job if I have to work for fifty cents an hour," and that is the last he said to me.

Q. Now, did you observe his physical condition while he was staying in this building or in your apartment?

A. Yes. He had an infection in a hand and foot and he couldn't hardly walk, and I soaked them in Epsom salt water, myself, and made him set with his foot and hand in Epsom salts.

[fol. 473] Q. Can you describe to the jury more particularly the hand infection and the foot?

A. It was either a cut or a deep scratch on his hand that got infected. Streaks was running way up his arm and all swollen and the foot was in the same shape.

Q. Do you know how he suffered these cuts?

A. No, I don't know. I just know he had them.

Q. Now, did he stay in this apartment most of the time or was he physically incapacitated?

A. Yes, he was hobbling around, could hardly walk and read and watched television and drank coffee. I have a little girl eight year old. They had quite a time playing, talking, while he was crippled up.

Q. How would you describe Mr. Preston?

A. Well, to my knowledge, he was a perfect gentleman in my home, treated me as I was his own mother. And he told me if he got a job, would I let him stay there until he got a pay check and I said, yes. Then I picked up the paper [fol. 474] and found out he had been picked up. I couldn't understand it.

Mr. Elfers: Thank you, Ma'am. Your witness.

Cross-examination.

By Mr. Jean L. Auxier, United States Attorney:

Q. Mrs. Searcy, was he working as a bartender somewhere while he was staying in your home there?

A. When?

Q. Did he go out and work?

A. Not that I know of. Because I am at home all the time, I don't know what somebody is doing.

Q. But he did go in and out?

A. Yeah, but at night now he come in and while his foot was so bad he stayed in.

Mr. Auxier: All right. That is all.

The Court: Are you through with Mrs. Searcy?

Mr. Auxier: We are.

The Court: You may be finally excused, Mrs. Searcy.

[fol. 475] Mr. Elfers: Call Robert Fuller.

ROBERT FULLER, being called as a witness in behalf of the defendants, first being duly sworn, testified as follows:

Direct examination.

By Mr. John R. Elfers, Counsel for the Defendants:

Q. Will you state your name please?

A. Bobby Fuller.

Q. Where do you reside, Mr. Fuller?

A. Sir?

Q. Where do you live?

A. Brent, Kentucky.

Q. What is your occupation?

A. Work for the City of Fort Thomas.

Q. Will you describe what type automobile you have, Mr. Fuller.

A. 1955 Buick, hardtop.

Q. What color is that Buick?

A. Well, a green—I say a pale green, something or other like that.

[fol. 476] Q. A solid green color?

A. Yes, sir.

Q. When did you purchase this automobile?

A. February the 10th.

Q. 1961?

A. Yes, sir.

Q. And whom did you purchase the car from?

A. Sixth Street Fill Auto Sales.

Q. Who is the owner of the Sixth Street Fill?

A. Strickland or something like that.

Q. Vincent Stricklen?

A. Yeah. The name is funny to say. I can hardly say it.

Q. Do you have the title or license transfer certificate with you to this automobile?

A. I have the bill of sale here somewhere.

Q. From that bill of sale, would you give us the motor number and the identification number of this 1955 green, Buick hardtop?

[fol. 477] A. The motor number ain't on here.

Q. Serial number.

A. Well, that is 4B1100153.

Q. Would you read the remainder of the description of the automobile?

A. Buick, two-door, '55; license number is 135-911.

Q. Mr. Fuller, where is this automobile now?

A. T B A Parking Lot up here.

Q. Would you read the address of the parking lot?

A. 726 Scott Street.

Q. The car is there now?

A. Yes, sir.

Mr. Elfers: Judge, can we approach the bench, Your Honor.

The Court: Yes, sir.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Elfers: We would like permission for the jury to view this automobile since it is a very important facet of [fol. 478-484] this case.

[fol. 485] (Reporter's note: The court recessed and the jury, counsel, the Court and personnel of the court and the defendants withdrew to the outside of the building to view the automobile in question. At the conclusion of the recess, the defendants were present with counsel, all the members of the jury were present and the following occurred:)

DEFENDANTS REST

Mr. Leggett: If the Court please, the defendants rest.

The Court: Anything in rebuttal?

Mr. Meade: Yes, Your Honor.

Mr. Stricklen.

[fol. 486]

EVIDENCE IN REBUTTAL

VINCENT STRICKLEN being called as a witness in rebuttal by the government, having previously been sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. You are the same Vince Stricklen who testified yesterday?

A. Yes, sir.

Q. And you own the Sixth—

A. Sixth Street Fill Auto Sales.

Q. All right, sir. I believe you testified also that you sold the car, the 1955 Buick, to the defendant Sykes?

A. That's right, sir.

Q. Did you ever examine the trunk of this automobile, Mr. Stricklen, while it was in your possession?

A. Yes. When I bought the car, it was—the trunk was opened to show a spare tire and jack and so forth in it.

Q. Was there anything else in the trunk of this automobile?

[fol. 487] A. No, sir.

Q. Now, about the lock on the luggage compartment, could it be unlocked?

A. It could be unlocked. Like I said, it was a tempera-

mental lock. It would lock one time, next time it wouldn't. You might go back 10 minutes and open up real easy.

Q. Do you know what was wrong with it?

A. I never examined it that close.

Q. Was there anything wrong with the body of the luggage compartment lid that prevented it from being opened?

A. Not that I know of, sir. I never opened up the glove compartment at all.

Q. Did either—was there anything wrong with the trunk compartment that would prevent it from being opened?

A. No.

Q. Do you remember whether or not Mr. Sykes or Mr. Preston mentioned to you about coming into some money?

[fol. 488] A. Yes, I do.

Q. What did they tell you?

A. Mr. Sykes was up there and he went and mentioned that Kenneth Strunk had a relative to die down in Kentucky and was due to have an inheritance come to him.

Q. What about Sykes, himself? Did he tell you anything about coming into some money?

A. Well, he told me he was going to get a new job working with a bulldozer, making drainage lakes in a Tennessee area, and that he was to get an advance of \$500 to pay for his necessary moving expenses and his debts, in order to go down to Tennessee with this man this spring.

Q. Did you see Mr. Sykes after he had been arrested by the Covington police department on January 20th of this year?

A. Not the Covington police. Newport police.

Q. Newport police department.

A. Yes, I did. Around noon time of the 20th.

Q. Did you observe whether or not Mr. Sykes' clothing had any blood on it?

[fol. 489] A. No, I never noticed any blood on his clothing at all.

Q. Did you notice any blood or wounds on his body or face?

A. No. There was—only looked like he had lack of sleep, but there was no visible marks on him.

Mr. Meade: That is all.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants.

Q. Mr. Stricklen, you say Sykes told you that Strunk was going to get some money?

A. Yes, sir.

Q. And he also told you that he was going to get some money, is that correct?

A. Yes.

Q. How long have you been acquainted with Sykes?

A. Well, Sykes, I have been acquainted with him since last spring.

Q. And during this period of time has he discussed with you previously his coming into large sums of money or obtaining outstanding jobs?

[fol. 490] A. No, except that some weeks he did pretty good in the furnace business and some weeks he did not.

Q. Now, Strunk didn't tell you that he was getting any money, did he?

A. No. I had very little acquaintance with Strunk after the spring of last year.

Q. When did you acquire this 1955 Buick, Mr. Stricklen?

A. Approximately a week before the bill of sale was made out to me from Schott Ford, which was dated the 16th of January.

Q. Where was Mr. Sykes when you entered the Newport police station?

A. He was in a small office that they use for interrogation room in the basement of the Newport police headquarters, which was in the detective squad room.

Mr. Leggett: I have no further questions.

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Mr. Meade: Just a couple more questions.

[fol. 491] Q. You say you saw Mr. Sykes in the interrogation room?

A. Yes, sir.

Q. Did you notice any blood on the floor and on the walls in that room?

A. No, sir.

Q. Did Mr. Sykes ever sell any automobiles for you or close any deals to your knowledge?

A. He did not close any deals.

Q. Did he ever make some sales and you closed the deal?

A. No.

Mr. Meade: All right, sir.

Recross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. But you had made a proposition to Mr. Sykes if he could bring customers in, you would pay him?

A. That's right.

Mr. Leggett: We have nothing further, Your Honor.

The Court: Stand aside.

Mr. Meade: Mr. Silas.

[fol. 492] FRANCIS D. SILAS, JR., being called as a witness in rebuttal on behalf of the plaintiff, having previously been sworn, testified as follows:

Direct examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Are you the Francis Silas who testified in this case yesterday?

A. Kam.

Q. And you have testified that you interviewed the defendant Sykes on two different occasions, is that correct, sir?

A. That is correct.

Q. On either occasion did you ask him regarding the materials which have been introduced as the Government's Exhibit No. 1?

A: Yes, I did.

Q. Did you specifically ask him about the silk stocking mask?

A. I did.

Q. Did he say he had seen that before or not?

A. He said that he had manufactured them, he made them, the mask.

[fol. 493] Q. Did he say anything else about the mask?

A. Well, I asked him where he got the idea for them and he said he got them from a television show.

Mr. Meade: That is all.

The Court: Who was it that told you that?

The Witness: The defendant Sykes, Your Honor.

The Court: Do you want to cross-examine him?

Mr. Leggett: I am thinking.

Cross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. The defendant Sykes told you he made these hangers, is that correct, sir?

A. He told me he made the mask.

Q. Made the mask?

A. The stocking mask.

Q. And he got the idea from a television?

A. Yes, sir.

[fol. 494] Q. Well, which interview was this?

A. This was on January the 25th.

Q. On the 25th. That wasn't at the interview on the 20th?

A. No, sir.

Mr. Leggett. I have no further questions.

Mr. Meade: Just one further question.

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Did you question the defendant Sykes with reference to the license plate?

A. Yes, sir.

Q. Did you question him with regard to what those wire hooks were?

A. Yes.

Q. Did you question him as to who had made those hooks?

A. Yes.

Q. Did he say who had made those hooks?

[fol. 495] A. Yes. He said Preston made them.

Recross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Agent Silas, did you question the defendant Preston?

A. I talked to him on one occasion, yes, sir.

Q. And when was this occasion?

A. I talked to him after I had talked to Sykes the second time.

Q. Now, when was it?

A. After January the 25th.

Q. When was it that the defendant Sykes told you that Preston made these hangers?

A. He told me that Preston had made the hangers as I recall on the second interview with him, which would have been—

Q. And thereafter you—

A. (continuing)—the 25th and—

Q. Thereafter you interviewed the defendant Preston?

A. Yes.

Q. Did you specifically ask about these hangers at that [fol. 496] time?

A. Yes, sir, I think we asked him about everything that Sykes had told us at that time.

Q. Do you specifically recall what the defendant Preston replied with respect to your interrogation about these hangers?

A. I know that he didn't—he didn't agree that he had made them. He didn't admit making them, I am sure.

Q. Did he deny making them?

A. Well then, he would have denied it, yes.

Q. What was Preston's physical condition when you talked to him on the 25th or about the 25th?

A. I don't know.

Q. You didn't notice anything outstanding about it?

A. No, sir.

Q. Did you notice his hair?

A. No, sir. Not particularly.

Q. Could you tell the jury whether or not he had long hair or short hair?

A. Are you talking about—

[fol. 497] Q. Preston.

A. (continuing)—Preston? I would say it was about like it is now. I can't notice any difference in it.

Mr. Leggett: Thank you.

Mr. Meade: Just a couple more questions, if Your Honor please.

The Court: Just a minute. Are you going to ask him any more about conversations?

Mr. Meade: Yes, Your Honor.

The Court: Well, go ahead.

Redirect examination.

By Mr. N. Mitchell Meade, Assistant U. S. Attorney:

Q. Did you question the defendant Sykes with regard to those two caps that have the splits in the rear?

A. Yes.

Q. Did you ask him who had split those caps?

A. Yes.

Q. Did he tell you?

A. Yes, he did.

Q. Who did he say had split those caps?

[fol. 498] A. The defendant Preston.

Mr. Meade: That is all I have in regard to him, Your Honor.

The Court: Now, members of the jury, I want to again admonish you that the statements of this witness, which he says were made to him by the defendant Sykes, if you believe that they were made, they can only be considered as affecting the guilt or innocence of the defendant Sykes. They cannot have any bearing at all on the case against Preston. Preston was not present and what Sykes said that Preston did is not competent for you to consider against

Preston. He was not present, did not have an opportunity to deny the statement. In other words, I think you understand generally and that applies to all. There has been some considerable evidence of statements of these various defendants and I want you to clearly bear in mind that what one defendant says can only be used against that defendant or for him, whichever way you may feel, but it cannot be used or have any bearing upon the guilt or innocence of his codefendants unless they were there present and heard the statements made. That will apply not only to this particular instance, but also to all others.

[fol. 499] Q. What time of day was it on the 20th when you first observed the defendant Sykes? Approximately?

A. I would estimate about 9:30.

Q. In the morning?

A. In the morning.

Q. On the 20th?

A. On the 20th, yes, sir.

Q. And where did you see the defendant Sykes?

A. At the Newport police department.

Q. And whereabouts in the Newport police department?

A. It was down in the detective bureau.

Q. That wasn't in the interrogation room?

A. Yes. We retired to the interrogation room for quiet to interview him.

Q. Do you remember the defendant Sykes' physical condition at that time?

A. I recall that he had a cut on his lip, in the corner of his lip. I don't know whether it was the right side or the [fol. 500] left side, but he did have a cut on his lip and just a crease here in the corner of his lip and he daubed at it with a handkerchief several times.

Q. That is this one cut?

A. That is all I could see, sir.

Q. Did you notice any blood on his clothing?

A. I don't recall any blood on his clothing.

Q. Did you see any blood on the floor or the walls of either the detective's office or the interrogation room?

A. No, sir.

Mr. Meade: That is all.

The Court: Do you want to ask him?

Recross-examination.

By Mr. Robert Leggett, Counsel for the Defendants:

Q. Agent Silas, do you know what clothing the defendant Sykes was wearing at the time he was apprehended by the Newport police?

A. No, sir. I couldn't recall. I wouldn't know what he [fol. 501] was wearing when he was apprehended. I wasn't present.

Q. The only thing you know is—the only thing you saw was what he was wearing at the time that you questioned him, is that correct?

A. That's correct.

Q. You don't know where those clothes came from?

A. No, sir, I wouldn't know.

Q. You don't know when he put them on?

A. No, sir.

Q. Do you know what day of the week they clean the interrogation room at the Newport police station?

A. No, sir.

Q. And you don't know whether that room might have been cleaned before you came in that morning?

A. No, sir.

Mr. Leggett: No further questions.

The Court: You may stand aside.

PLAINTIFF RESTS

[fol. 502] Mr. Meade: That completes the government's case.

[fol. 503] (Reporter's note: The court recessed until 12:40 p.m., the same day, to-wit, March 18, 1961, at which time all the defendants were present with their counsel, all of the members of the jury were present and the following occurred:)

The Court: Approach the bench. (Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

The Court: Gentlemen, I want to call your attention to Rule 30, which provides that:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall "be furnished to adverse parties. The [fol. 504] court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Do you have any instructions you want to request or do you want to offer written instructions or just the Court give the usual instructions on conspiracy?

Mr. Leggett: We have no special instructions.

The Court: Do you have?

Mr. Meade: No, Your Honor. We feel that your instructions are usually adequate.

DEFENDANTS RENEWAL OF MOTIONS AND OVERRULING THEREOF

Mr. Leggett: I would like to raise another matter while before the Court. I have several motions which have been made. Specifically I would like to renew my motion to suppress the evidence at this time. I would like to renew my motion for judgment of acquittal and I would like to renew [fol. 505] my motion to set aside the jurors and declare a mistrial, based upon the incident which occurred with respect to the witness Sykes.

I would like to point to the Court's attention that the defendant Sykes was arrested and convicted under a municipal ordinance of the City of Cincinnati and that he was not charged with a statute which at that time was not being utilized.

Further, I would like to question at this time that certain exhibits in my recollection, according to my notes, were not offered and admitted in evidence. Specifically, I have reference to certain materials which are contained in the pillow case, which I had a motion to suppress concerning. It runs in my mind that the Court sustained my objection at the time it was made and I do not recall their having been offered in evidence and accepted in evidence after the testimony of Officer Dotson. I am a little shaky on that point.

The Court: I don't recall that but let's take these things up in the order which they are offered now.

You are renewing your motion to suppress the evidence.

- Do you want to be heard any further on that?

[fol. 506] Mr. Leggett: No, sir. I don't think so, Your Honor.

The Court: Let that be overruled.

Now, you are also renewing your motion for a judgment of acquittal as to all three of the defendants.

Mr. Leggett: That's correct, Your Honor, individually, and all three of them.

The Court: All three of them.

Do you want to be heard on that any further?

Mr. Leggett: I think that the Court is adequately apprised of my position with respect to the things in the evidence.

The Court: Let that be overruled.

Now, your next motion is to withdraw one of the jurors and set aside the swearing of the jury and declare a mistrial,—

Mr. Leggett: That's correct, Your Honor.

The Court: (continuing)—because of the question asked by the United States Attorney as to the alleged offense of Sykes carrying a deadly and concealed weapon, is that right?

[fol. 507] Mr. Leggett: That's right.

AT THE BENCH

The Court: I think the Court's admonition on that adequately takes care of it. I might say this, while it might be significant in some cases, I do not believe in the light of the whole record here that his having a pistol, whether he was

convicted or not convicted, would be a great shock to any of the jurors, in light of his own testimony, but at any rate I feel that the Court's admonition is sufficient to take care of that. So let that be overruled.

Now, as to the introduction of the exhibits, I don't recall, but it was my thought that you offered the pillow case. The record will speak.

Mr. Auxier: Does that not mean that it was admitted with our avowal that we would?

The Court: I think so. If not, make it a part of the evidence now, so there is no question.

Mr. Auxier: We would request permission to do that, because we misunderstood the proceedings if we were left without the benefit—

The Court: It was the idea of the Court at the time when you offered them and Ciafardini said he did not take them [fol. 508] out of the car, I said that upon the representation to the Court that you will produce the witness, let them be made a part of the record. At any rate, I have considered them a part of the record, so I will overrule the motion.

[fol. 509] The Court: You may proceed with your argument, Mr. Leggett.

CLOSING ARGUMENT FOR DEFENSE

Mr. Leggett: May it please the Court.

The Court: Mr. Leggett.

Mr. Leggett: Mr. District Attorney. Ladies and gentlemen.

At this stage in the proceedings it becomes the duty of the attorneys of the various parties to make certain observations and commentaries with relation to the evidence that has been adduced before you from this witness stand. Nothing that I say is evidence in this case. The Court will so instruct you. What I say is my view, my observation, [fol. 510] but it is not evidence. It is not factual evidence. It is not sworn testimony. You can recognize that.

Under our grand jury system here in the United States, a criminal case is commenced by an indictment. The United

States' case is presented to a grand jury and they determine whether or not the person should be prosecuted, whether there is reasonable cause to believe that a crime against the United States has been committed. That is the indictment which was presented to you, which has been read to you by the United States Attorney. This is the vehicle which brings a case, a criminal case, before this court and is based upon an ex parte presentation or the presentation of the United States Government's evidence to this group of people and they determine whether or not they feel that the prosecution is warranted. After an indictment is returned, the defendants are arraigned and they then have a Constitutional right to a trial by jury. Actually, the jury system is something which is ancient in law. It is a division of the trial. Now, the Court will instruct you that the function of the jury is to ascertain the facts, to find out exactly what has taken place. Yours is the duty to listen to the testimony of the witnesses, to look at the exhibits, to make [fol. 511] an evaluation. Then you 12 must agree as to what actually transpired. You have heard from this witness stand the different witnesses who said, "Well, such and such happened on a certain day:" "And I saw this man," or, "I saw somebody that looked like this man," and, "I saw this car," and, "I heard this." Yours is the duty to evaluate that and ascertain whether or not you feel that these things did, in fact, take place.

The Court will further instruct you that when you look at these facts and when you determine, you have the problem of ascertaining whether or not a crime against the United States has been committed by anyone of these three persons or by all of them and in doing so, that you apply a certain yardstick or a certain measure to those facts in order to find that any one of these men here or to find all three of them have committed a crime, you must be convinced beyond a reasonable doubt.

The Court will define this concept for you, but basically we have merely to refer to our everyday activity to find out what it is. A reasonable doubt is a doubt based upon a reason. It is the fact or it is the state of affairs upon which you would act or refrain from acting in your normal affairs. [fol. 512] I have often said in arguments that suppose that you or I have \$10,000 and we want to invest it in a stock

and so we go down here to the stock broker and assume he is about like the grocer and has his stocks on his shelves there, so we walk along with our \$10,000 in our hand and we pick a stock and we invest that \$10,000. Now, the reliance that you or I might use, the judgment which we might use in selecting the stock which we invest in, can be roughly compared to the measure which we must apply in this case. We wouldn't put our \$10,000 in there unless we were convinced beyond a reasonable doubt that we weren't going to lose it the next day. We would be looking for something that would be gold chip. We would keep that reservation in mind, "I am really sticking my neck out here and I want to be careful." Well, your duty involves these three men's liberty. If convicted they could possibly be deprived of that liberty for a period of time. The law has erected for them a standard and they have said that you must—the jury, all 12 of you, must be convinced beyond a reasonable doubt that the crime did occur and that these persons were the persons who committed it.

With that thought in mind, let us examine what has transpired here in this courtroom over the past few days.

[fol. 513] At the beginning of this case, my opponent, Mr. Meade, gave an opening statement and in this statement he set forth certain facts that he felt that the evidence which was presented from the witness stand would develop. This opening statement is in the nature of a framework or a plan, an explanation. It is awfully difficult to present a case from the witness stand and give it to people cold, because they can't see how each witness fits into the pattern. For this reason the attorneys are given the opportunity of stating this pattern, stating what they expect the evidence to prove. Now, Mr. Meade stated at the outset the evidence would establish that these men, these three men who are seated here at counsel table, were seated in an automobile in the City of Newport, Campbell County, Kentucky, that they had been there for some five hours, that the police officers investigated and they were unable to obtain an explanation of the presence of these men there. They further stated that it developed that these men were unemployed and had no visible means of support and that for this reason they were arrested and the car was impounded and they were taken to the police station and booked.

[fol. 514] Now, let's measure momentarily—let's measure the evidence offered on these points. We found these men were indeed seated in an automobile in Newport, Campbell County, Kentucky. Were they vagrants?

The evidence developed that one of these men paid \$150 that very evening to purchase an automobile, the one they were seated in. They were not employed, but in this time of economic peril which is upon us, I don't think mere unemployment is a sign of vagrancy. I think it is a sign that our economy is a little bit sick and these men testified that they were drawing unemployment compensation, that two of them were there because the third man had told them that someone would come along and give them an opportunity to obtain employment. Now, I don't know whether this is a reasonable explanation, but if I had been unemployed for the length of time that Mr. Strunk had and my brother-in-law told me that if I waited with him until this man came along and I had a chance to get a job, I would probably sit longer than five hours and I wouldn't think it unreasonable to do so. Employment isn't that easily available and this man testified he has been looking for work but he hasn't been able to get any.

Again referring to the opening statement of Mr. Meade, [fol. 515] he stated that the men were booked for carrying a concealed weapon after a search of the automobile and that certain other things were found in this automobile. Now, you have seen the exhibits which were found in this automobile. They have been offered in evidence before this court. You have seen the men. You have heard the testimony of the arresting officers.

Now, at this point, if we examine this evidence, we might question was there a crime committed. Well, there is a charge of a crime. The men were booked for vagrancy and carrying a concealed weapon. That charge has not been disposed of. That charge is not before this court.

Let's go ahead and examine all of the evidence without referring to some of these conversations and some of these things that took place after the arrest and see what we have alleged. It is alleged in the indictment and in the opening statement that on or about December 10, 1960, John Sykes purchased a .38-caliber pistol from Elmer Joyce Gun Shop. You gentlemen heard Mr. Joyce testify that on December

the 10th, 1960, he sold a gun to Mr. Sykes, it was not the first occasion he had ever sold a gun to him—in all probability it may not be the last—but he did sell a gun to Mr. [fol. 516] Sykes.

The government further charged that on or about January 18th, Kenneth Strunk purchased from one Bernard M. Hedges, the proprietor of the general store at Berlin, Kentucky, two caps. You heard Mr. Hedges testify. You heard Mr. Strunk testify. You have seen the caps. Unquestionably, these caps were purchased by Mr. Strunk from Mr. Hedges. There is no doubt about it. Mr. Strunk made this statement to the FBI. He made this statement here from the witness stand.

Next the government charges that on or about January the 17th, John Brenton Preston and John Richard Sykes, by deceit procured from Vincent Stricklen, used car dealer, Newport, Kentucky, an automobile to be used in the robbery, which car was purchased on January 19th, 1961, by John Richard Sykes in the name of his wife, Elizabeth Sykes. Mr. Stricklen appeared here on the witness stand and he testified and he said, "In the last year, I have sold to John Sykes four automobiles. Mr. Sykes owes me \$130 on a 1955 Plymouth that he purchased from me last year before he purchased this automobile. On January the 16th or 17th, or Monday or Tuesday, Sykes came to my used car lot and he got a car for a particular purpose." But he also testified that since the first of the year that Sykes has [fol. 517] been going, what we call 'birddogging' in the trade, or going out and trying to stir up some customers, bring in customers to the used car lot, trying to move these automobiles. Mr. Stricklen testified that he is very well acquainted with Mr. Sykes; he has known him for some time and he knowingly turned that automobile over to Mr. Sykes for his use. Now, the only deceit that was involved here was a question of the purpose that the automobile was actually to be used for. Of course, I don't think Mr. Stricklen felt that he was deceived because he sold the automobile within two days of the time that the automobile was taken by Mr. Sykes, a person well known to Stricklen. Sykes came in, purchased the automobile, paid \$150 down, signed a note for the balance. Everything was proper and in order. Who was deceived and by what? Had any question been

raised as to who had this automobile, that particular day? Stricklen said, "Why Sykes had it. I turned it over to him. I knew he had it. He was going to Lexington with it. I knew exactly where it was. I knew who had it." The only deceit that is involved here is deceit as far as the purpose was concerned. What is the deceit as far as purpose is concerned? Is it something that is essential or is it some- [fol. 518] thing that is incidental? That is for you to determine, ladies and gentlemen.

Now, further, the government charges that on or about January the 20th, there were certain things found in this automobile from various places in it. You have seen the things. You have heard the testimony of the officers. You have heard the testimony of the defendants. Mr. Sykes testified that he knew about the things that were in there. Mr. Preston had some knowledge. Mr. Strunk had some knowledge of what was found in the automobile. Certain things he knew about, certain things he didn't know about. It was somebody else's automobile. There has been no evidence to show that all those things were put in—all of them were put in, in the presence of the defendant. There was no evidence to show who put them in. These things were there.

Now, the government further charges that on or about January the 8th, John Richard Sykes and Kenneth Strunk were in Berry, Kentucky, for the purpose of observing said bank. Now, in my recollection, measuring this against the testimony which we heard, I am afraid there was a total failure of proof as far as this particular overt act was concerned. I don't believe that any witness here testified that Strunk was in the City of Berry, Kentucky, at any [fol. 519] time. I do recognize the testimony of the feed store merchant from down in Berry, Kentucky, and he was in an ideally situated position. He was right there in the front of his place of business. He could see quite a bit of the town. He described it for us to a degree. We have a pretty good idea what it looked like. He said that on or about the 18th or 19th of January he saw an automobile with two strangers in it, in the City of Berry, Kentucky. The automobile was a Buick automobile, a General Motors car—he wasn't sure about whether it was a Buick or not, but he was definite that it was a General Motors car

and he is qualified to identify them. He owns one, as I recall his testimony. He testified that the defendant Sykes was seated in that automobile and that another person was in the automobile, but he wasn't certain who he was or what he looked like. He did say that he felt that it might have been the defendant Preston, but he wasn't at all sure on that point. He did do one thing. He specifically described this automobile as far as color was concerned. If you recall, on cross-examination I asked him very carefully, "Well, what about the color scheme? Where were you so you could see it? Were you certain about the color?" And he described it. It was a two-tone automobile. I believe [fol. 520] he said it was cream and black. He said it was dark, a two-tone automobile, and he said it was dark. When I asked him about what kind of dark, he said it was black, cream and black. Now, you each have had an opportunity to view the automobile which 'was deceitfully' obtained by Sykes for his use on the particular day that this transaction allegedly took place, and in my observation that is one of the greenest automobiles that I have ever seen. It didn't look cream and black to me. It didn't look two-tone. It looked like a green Buick automobile.

Now, let's examine further the testimony that has been offered here. We find that after the 20th day of January, this case took on certain federal questions. It took on a federal complexion as it were. The reason for this federal complexion arose from a statement which was made by one John Sykes. Mr. Sykes told the police department of the City of Newport, he told the agents of the FBI, that here was a plot to rob a bank, "and here is how it was supposed to be pulled. Here is what is involved in it. This is really a big deal." Now, my own impression here is that we had a little fish in a big puddle making a big noise. You can [fol. 521] make up your own mind as to whether or not Mr. Sykes was telling the truth or whether he was telling a falsehood. You heard him testify from the stand, you know his character, you can recognize his propensities from what he has said and from what the evidence has shown. I think possibly that this confession and everything that has been connected with it was best characterized in the statement of another witness, the other defendant, Mr.

Strunk, who said sometimes his brother-in-law has some pretty grandiose ideas.

Now, let's look at this. The other two defendants have been questioned continuously by the FBI and carefully. The FBI agents told you exactly what questions were asked and what answers were given. They told you the exact statements which were made by these defendants. Now, what did the defendant Strunk tell the FBI? Well, he told them that "Sykes is my brother-in-law. I am unemployed. I know my brother-in-law pretty well. My brother-in-law came to me one day and said, 'I got a chance to make \$5,000,' and he said, 'John, I don't want to hear anything more about it.'" He figured that that is one of these wild ideas, a wild plan. He didn't want anything to do with it. He didn't want to hear a thing about it.

[fol. 522] Let's look at the testimony of the witness Preston, the defendant Preston, John Preston. In the first place, Preston was only briefly acquainted with these people, having only met them the first part of January, having been arrested with them on the 20th of January. The uncontradicted evidence shows that Preston was incapacitated, he was injured on or about the 7th or 8th day of January; that he stayed with a lady, she told you that he was having difficulty in getting around, he was hobbling around. I ask you, ladies and gentlemen, consider this man just for a moment. He has an injured leg, is hobbling around, he has one artificial leg—this reduces his mobility a considerable amount—the man is unemployed during the period of his illness. He testified that he had employment up to the time he was injured in this fight, that subsequently he was unable to carry out his duties as a bartender, he was forced to lay off work and he was forced to stay with friends. He is a married man, he has children, his situation was serious, there is no question about that. But, ladies and gentlemen, does this sound to you like the type of a man who would engage in a conspiracy to rob a bank? I mean bank robbery is fine, it sounds very interesting, it is fascinating, you have one of the finest police forces in the world today to watch [fol. 523] your banks, they are highly mobile, they move fast, they have the best resources right at their fingertips. All right. Here we have a crippled man, a man with one artificial leg, a stab wound in the other leg, and he is going

out and rob a bank? I am afraid, ladies and gentlemen, that I feel this is not the type of person who would engage in it, the man can't get around, hobbling around, he would have the most extreme difficulty in getting from the getaway car to the bank to commit the robbery and the odds are about five to 10 against him getting back to the car. Just common sense would tell you that a man like this wouldn't even consider engaging in a bank robbery in his physical condition. If he were in perfect physical condition, being able to run and everything else, sure, he might do it. I don't know. But in the condition he was in, I would say it would be pure insanity for him even to think about anything like that and I believe—you have listened to him on the witness stand, you have heard what he said about it.

Now, there are certain elements of the charge of conspiracy. There are certain things which must be proven before we can find that a crime exists.

[fol. 524] A conspiracy is a peculiar form of crime in law. Normally you and I are used to this state law proposition that you can have all kinds of criminal intent as long as you don't do the act, no crime has been committed. Conspiracy is the one exception. It is the type of crime that was a child of the common law. It was enacted into law by a statute of the United States but it makes the act of planning a crime, planning to commit a crime against the United States, makes that a federal crime. Now, the elements of conspiracy, as the Court will instruct you, are an unlawful agreement to commit a crime against the United States and that must be followed by some overt act, by one of the co-conspirators, which act is designed to further the purpose of this conspiracy. Now, the burden is cast upon the United States to show that in this particular situation, these three persons conspired together. Now, it could have been that two of them conspired at one time and another two conspired at another time, but it all has to involve the same crime and it must be around or about the same period of time. In other words, two of them can't conspire in 1930 and two more in 1940. It must be within a reasonable period of time. They must have gotten together and made an agreement that, "We are going [fol. 525] to commit a crime against the United States: We are going down and knock off the Union Bank at Berry,

Kentucky,"—a bank which, incidentally, in 35 years has never been robbed, in a town which according to the testimony of the bank president, hasn't had a daring daylight robbery in the 35 years of his memory. This is the bank which this conspiracy is to rob. We know from the statement of Mr. Sykes that they anticipated getting a hundred to a hundred and ten thousand dollars out of this bank, but who were they? Now, according to the statement of Mr. Sykes, which he gave to the Federal Bureau of Investigation, he was approached in the Depot Cafe, by certain persons and he and these persons plotted this job, laid out a get-away, they did all these things to knock off a bank. As I recall the testimony, I think they had it all worked out and they wanted to hire him as the driver for \$10,000. That is how it was, but anyway he was approached. After that, he testified and Strunk testified and Preston testified that Sykes came to Strunk and Preston and said, "I got a chance to make \$5,000," and that they rejected him, they rejected the plan, they didn't even want to hear about it. It was too absurd. I think, ladies and gentlemen, you sat here and listened to this, you heard the plan, the alleged plan. You have heard what the [fol. 526] situation is. I think you can evaluate as to whether or not this did, in fact, occur or whether or not this whole thing is a figment in the imagination of one person. My inclination is to believe that the latter is the true state of the facts.

Now, I will say this, that all of these overt acts, all of these incidentals that have been shown, without this confession tell us nothing. We heard a witness testify from this stand. His name was Billy Monroe. Now, Billy is a bartender over here at the Depot Cafe. Now, Billy's testimony as I view it was the only independent evidence which was offered by the United States tending to show that there was any conspiracy or plan to do anything anywhere, independent of this confession, this fabulous, fantastic scheme; the only physical evidence tending to show that there was anybody going to do anything anywhere, was the testimony of Billy Monroe and what did Billy say? He said, "Well, I was in the cafe and Sykes was there and I am not sure whether the other two were there. I believe they were but I wouldn't swear to it." That was

his statement. He was on the stand, he was under oath, he wouldn't swear to it, that these people were there, but he did hear Sykes say something about a big job down in [fol. 527] Kentucky. He wasn't sure where down in Kentucky. And when I asked him, "Could it have been a furnace job down there?" he said it might have been. But I think the true character of the Depot Cafe, and possibly Billy Monroe was characterized, was brought out in his one statement, "Around my place people are always talking about big jobs." I wonder why. Wonder what type of people these are. I wonder if there is any truth whatsoever in their chatter, in their talk. How much of it is induced by the product which is sold in this establishment, how much of it is induced by a desire on the part of these persons to achieve certain stature, to be men of violence, to be the modern day Robin Hood or perhaps the modern day Jesse James. I wonder what the motivation is that makes people talk like this and say things like this.

Ladies and gentlemen, I can't help but feel that in view of all this evidence—

The Court: You have spoken 30 minutes. You can have as much time as you want, however.

Mr. Leggett: Thank you.

In viewing all of this evidence, ladies and gentlemen, I wonder how much of this is in fact a true plan to rob a federal bank possibly, or how much of it grows out [fol. 528] of psychological need of an individual for recognition as an outstanding member of some profession. What profession? The profession of thieves, robbers, gamblers—who knows? How much of this story of this confession that Mr. Sykes has made rings true? How many of these things would have any significance whatsoever independent of this alleged confession he made?

Let us examine the other two defendants. This young man, Kenneth Strunk, you saw him on the witness stand. You heard him testify. I think you can evaluate him and his position. My own comment is I think that he has the misfortune to have a brother-in-law who is a pathological liar, a man who has gotten himself into a terrifically complicated, a dangerous position, by a lot of talk. I think Strunk is very straight forward. He did not impress me as the type of person who would engage in crime for a

living. He struck me as being a type of boy who would try to make his own way and would not try to become a leech upon society.

Let's look at Preston. Preston is a little bit different. He is a boy who has had a prior conviction for a felony. He has a background, but he also has a certain amount of knowledge that was impressed upon him as a result of this [fol. 529] background. I wonder—you listened to Mr. Preston when he sat there on the witness stand and I listened to him, too. I listened to his elocution, his choice of words, his ability to express himself, and his particularity in answering a question as to truth, and half-truth, when he couldn't answer a question yes or no, he explained it. One thing that he did on that stand, he denied having any part of any agreement to rob the Union Bank at Berry, Kentucky, ladies and gentlemen.

I don't think that we have to consider the question of the veracity of any witness who testified from this stand. You have heard what they have to say. You have heard their description of events. I think one thing that has impressed itself upon your mind as much as it has impressed itself upon mine, that the one man, the one person who is completely out in left field, the one man whose testimony virtually disagrees with everything else that has been shown and demonstrated here is one defendant, John Sykes. This planned bank robbery is one of the most grandiose things that I have heard in a long time, but for some reason or other I listened carefully to Mr. Silas's evaluation of the confessions, both the first one and the [fol. 530] second one, and I can't help but think that the main reason that these three defendants are here before you today is because of the statements of this particular, this one defendant, this one person. I think without this great map or mat of fabrication that nothing here tends to indicate that anybody wanted to or did, in fact, engage in a conspiracy to violate the laws of the United States. For some reason or other, it just doesn't seem to ring true, it doesn't fit together, it's unreasonable. The overt acts occurred, but yet, where is their agreement, where is their proof of an agreement? Of course, the District Attorney can argue, "Well, we have showed that this one and this

one did this and this and this one did that, and from tying all of these things together, it is only reasonable to assume that these men were going to pull a bank job. We found guns, we found masks, we found pillow cases to carry bundles of money in, a hundred thousand dollars, no doubt." But let me ask you, isn't it just as consistent with good reasoning that these pistols are not federal bank only robbery pistols? Neither are these masks marked to be used only for robbing the Union Bank at Berry, Kentucky, now is this deceitfully procured Buick which changes color like a lizard used only for the purpose of federal bank robbery at Berry, Kentucky.

[fol. 531] They state that they saw this man Sykes down here. I don't doubt that. I don't know whether they did or not. They state that they found this other man Strunk along with Sykes in Berlin, Kentucky, a considerable distance away from Berry. Well, ladies and gentlemen, I feel that the road which runs to Berlin, Kentucky, is not exclusively a get-away road for a proposed robbery of a bank which is located at Berry, Kentucky. I have no doubt that every day somebody uses that road and I don't think their purpose in using it is to get away from a bank robbery. I don't think that everything or anything that everybody has done, that each of these men has done, since the first of January, is conceivably dedicated to the purpose of robbing the bank at Berry, Kentucky. I think you can take any act on the part of any person and you can attribute to it a motive which is really not a true motive. Sure, Strunk was in Berlin, he was there. Why? At the instance of Sykes. What was Sykes' reason? "I am going down to sell an automobile. I want you to drive me down." Why is it that every one of these events which connects Preston and Strunk to any manner or purpose of bank robbery is directly attributable to something which Sykes [fol. 532] said or something which Sykes did. Who had knowledge of all of these events, who gave the information as to where they went, what happened, where they were? Sykes did.

Ladies and gentlemen, I respectfully submit to you that viewing the evidence in this case as a whole, I cannot see that these three men have conspired together with the

intent to rob the Union Bank of Berry, Kentucky. I do not think that the federal government has proven beyond a reasonable doubt that the big job in Kentucky was anything more than the installation of a furnace somewhere. I feel that there has been a total failure of proof that there was any conspiracy on the part of anyone to commit bank robbery.

I want to express my appreciation to you for listening to us and bearing with us during the long trial of this case.

Thank you very much.

Mr. Auxier: May it please, Your Honor.

The Court: Mr. Auxier.

CLOSING ARGUMENT FOR PLAINTIFF

Mr. Auxier: Ladies and gentlemen of the jury panel. As I listened to the able, clear and logical argument of counsel for the defense, I was struck by several things. [fol. 533] In the first place, he reminded the jury of the jury's position and the jury's importance in this and I couldn't disagree with any of that. He went over the evidence at considerable length and I will have to repeat some of that. I will have to warn you in advance that I am unable to agree with very much of his analysis of the evidence and its significance.

On the whole, considering the situation at the close of argument by counsel for the defense and recalling the trial and the various battles and differences and conferences that we have had before the Court, we will have to admit that win, lose or draw, that these defendants have been ably defended. The government was not allowed to put in anything except what lay well within the legal limits of proof. All that is brought before you is brought before you only after the strictest scrutiny and the readiest objections of able and alert counsel for these defendants.

Now, it is not wrong to consider the problems that you have. The Court will explain to you that your duty is to determine the facts. You don't need to trouble about law. You need only to answer in your minds whether certain necessary facts existed in this case.

[fol. 534] Before we go any further, I would like to ex-

plain to you the nature of this particular trial, because there are many jurors who have had considerable jury experience, who have never tried a conspiracy case. It is important that you bear in mind you are not trying these defendants for robbing any sort of bank. They didn't rob anything as far as we know and we didn't undertake to bring proof of any robbery. It is true that one of the defendants had been unemployed for some time and was able to pay \$150 on an automobile and bought a couple of caps that he hasn't shown any great need for, in a place where he hasn't shown very much reason for being. But they are not charged with a robbery. Now, here is what the charge is. The charge is an agreement—that is what a conspiracy is, an agreement—and a conspiracy in the sense of a criminal conspiracy is an agreement to commit a crime. The charge here, though, is an agreement to rob a particular bank. Now, that is in this court because that bank, as shown by the evidence, produced before you, is insured by the Federal Deposit Insurance Corporation, and it therefore becomes the interest of the United States to protect that bank because its assets, its deposits, are insured by that corporation. Now, you have to prove the case in a [fol. 535] matter of conspiracy, it is therefore not necessary that we prove a robbery of a bank. However, it is also, I think, proper to remind you at this point that merely thinking about the robbery of a bank, that's not a crime and that is not enough to go on. Some people might agree to commit a crime, still it takes more than that. Merely thinking about it or perhaps even ordinary discussion is not enough to make the crime that is to be assessed by you. That is your responsibility to determine whether it actually took place or not. There must be only the thinking, not only the agreeing, but there must be an act committed, looking toward the accomplishment of the offense, in this instance the robbery of the Bank of Berry. There must be an act committed.

Now, the law is that not all the conspirators need commit an overt act, if you find that the agreement was struck and you can find that from what they did. People don't go sign contracts to rob banks and put them on record. You must find what was in their heads by the actions of their hands and voices and bodies. In fact, that is the way

you determine what is in the minds of most people about most things. A fellow may say one thing but if he does [fol. 536] another thing, you generally know which he intends to do. You generally know whether what he said represented what was in his heart or what he did represented what was.

So we must have then, the government must show you, an agreement and in this case I tell you bring you no evidence, we brought you no evidence of an explicit, oral or written agreement to rob the bank of Berry. We brought you evidence of a multitude of actions and that is what we want you to consider and that is what I want to review with you at present.

Now, as I said a moment ago, it is necessary for the offense of conspiracy to be completed, to actually be committed, that somebody, some one or more of the conspirators must do one or more acts. Now, the law is, as I am sure it will be explained to you, if any one conspirator commits any one act, then all those who were in the agreement are guilty. Not all conspirators have to join in the commission of an act, but they must all be parties to the agreement. You must have evidence that convinces you beyond a reasonable doubt that each of the parties charged or to be found guilty were parties to the agreement when the act was committed. So we must have an act, we must have an agreement, and [fol. 537] we can have more than one act, but the government must prove at least one act by at least one of the parties charged. That is the law of conspiracy. Now, we do not have to prove to your satisfaction that all of the acts, the overt acts, as they are called, were committed. Any one of them is enough to make the crime as to all the people, not limited to those who committed the overt acts that were proven, but to those you found were in the agreements. Now, that is the peculiar nature of this and that is why I have taken the trouble to explain this to you. I am sure the Court will explain this to you, but it is well for you to bear in mind the peculiarities of this kind of offense.

Now, let us look at the situation which the evidence reveals. The subject of the crime is the bank, the Bank of Berry, the Union Bank of Berry, a state bank, and ordinarily the robbery of a state bank would not be an offense against the United States, but this bank is insured by the

FDIC, therefore a conspiracy to rob that bank is a conspiracy to commit a crime against the United States.

Now, let's start adding up our figures here. The Union Bank of Berry is in a small town. That small town is not on a main thoroughfare. It is some miles off of U. S. [fol. 538] Route 27, the most important thoroughfare in the vicinity. The town of Berry has three or four hundred people. Not a very big town, it does not have enough people to support a police officer, a peace officer, it has no protection of its own organization. The sheriff comes in there occasionally, the state police occasionally, but most of the time there are no police officers, a peaceful farming community, not very much crime or disturbance. The very sort of situation an alert bank robber would be looking for:

Well, now let's see what else is true of this Bank of Berry. In the month of January, the farmers have brought in their tobacco, to the markets and sold it and taken their money to the bank. The Bank of Berry is in a region where it draws its customers from farmers and those who deal with farmers and it has need for more than its ordinary supply of cash. So in December, January and February, the cash on hand in the Bank of Berry would be the highest of any time during the year. Another thing which a bank robber with forethought would think about.

Now, we are not able to bring you any evidence as to what was in the minds of these gentlemen, what knowledge they had about the Bank of Berry, but it is in evidence before you and if it is known to the witness, it could have been known to other people, that there is no alarm system in the Bank of Berry. Another thing that makes it an attractive situation for anyone who might be interested in a little bank robbery.

Well, so much for the Bank of Berry. It is the only business in Berry that would carry a substantial amount of cash on hand on a business day. Now, that is the bank.

What is the evidence about our defendants? The defendant John Sykes, in January 1961, was unemployed, had been unemployed, oh, for a matter of some weeks at least. I believe he said that it ran up until November and from that time on he was without a job. The defendant

Kenneth Strunk, he lost his job in May of 1960, he drew his unemployment insurance until November of 1960, he was unemployed and he had no source of income. The defendant Preston, at the time we are talking about may have said that he was a bartender—I didn't understand what he meant by that—at the—what was it—the Alpha Club, a resort which is not without some reputation on its own. But whether he was a bartender there or not, he also told you that he had been in a fight, that he had [fol. 540] gotten some knife wounds, and he wasn't able to work. He would tell you that he was very badly disabled. He was using crutches, but he didn't have any crutches in his vicinity the night of the 20th of January or the morning of the 20th of January. In fact, if I understood him, he had already at that time thrown his crutches in the Ohio River. But in any event, he certainly wasn't working anywhere. His landlay—not his landlady, but the kind lady that had taken care of him and dressed his wounds, told you enough that you know that he wasn't working anywhere. He was in and around the house with her family, but he couldn't have been working anywhere.

Three unemployed gentlemen. Now, what else have you? The three unemployed gentlemen know each other. Two are brothers-in-law. The third is enough of a friend, while there may be some variation in the way they explain their association to you, he is enough of a friend that he has been seen with the other two in the Depot Cafe, another remarkable institution. He has been seen with both of them on more than one occasion, before the 20th of January. He has been seen with one or the other—Preston has been seen with one or the other of the defendants at other places. He admits that he and Preston—Preston admits that he [fol. 541] and the defendant Sykes were at the car lot, run by Mr. Stricklen, together. So there was some association between the three of them at and about this time. They were on terms that they met occasionally at more than one place. Mr. Sykes told you, and I think there is no grounds to doubt it, that so far as he and the defendant Strunk were concerned, they were brothers-in-law and they were fully as intimate at brothers-in-law ought to be and could well afford to be. They saw each other frequently and

apparently enjoyed being together. So we have the three associating at and before the time concerned in this case.

Now, let's turn our thoughts to the early morning hours of January 20th. At 3 o'clock, in fact, occasioned by a call to police headquarters, a cruiser, a police cruiser comes to this neighborhood of what—is it Tenth and Monumouth?—I am not very good at these addresses around here, because I don't know much about any big city and Newport and Covington are both big cities to me—but it was somewhere in that neighborhood, in the vicinity of a night club, that an automobile is seen parked for hours. I believe some of the defendants undertake to tell you it wasn't as long as some of the witnesses for the government said. [fol 542] But whatever they say, there is no way to doubt that it had been there for hours at 3 o'clock in the morning. The police cruiser comes up and finds the three defendants there at or in or right near that automobile. The officers questioned them, "Where is the title to this automobile?" This boy says, "Don't have any papers." Now, it was argued by able counsel for the defendant that they were taken in on vagrancy and how could you call a man a vagrant if he did and I think truly he did buy this automobile, maybe that very afternoon. But I want to remind you that under the laws of the Commonwealth of Kentucky, which these officers were serving, just as well as any other laws, under the laws of the Commonwealth of Kentucky, it is a violation of the law to operate or have an automobile on the public ways without having in it the registration certificate and bill of sale and title papers as required by the Kentucky law. That was an offense committed and admitted in the presence of the officers right there. So, whatever criticism may be leveled at the officers for arresting them on this occasion, please bear in mind that the evidence showed clearly that an offense existed and under circumstances to make the officers more than a little suspicious.

Now, let's look at a few of the other circumstances. [fol 543] They officers said, "Well, they only had 25¢ among them in the way of money." Now, of course, we would have to concede, and we are sure you would agree, that a fellow would not—who has not a lot of money on

his person is not a crime. That wouldn't mean anything. A whole lot of us would be in very serious trouble if it were a crime not to have money. So that is not an offense. But after these gentlemen were taken into custody, they find in the glove compartment two pistols, loaded. Well, that statement, that is the basis on which there might be some difference of opinion. Certainly, in the Commonwealth of Kentucky, a man's owning a pistol is not a crime. It is not an offense to have one in his home, loaded or unloaded. It is not an offense to have one in his possession in public, if it is seen, if it is visible, loaded or unloaded.

Now, the defendant Sykes' explanation of that moves a little sympathy in my heart. He says he is a gun trader. Well, I am, too. I don't know how many pistols he has got, but I have got as many as he has got. I have got at least one more. Guns are fascinating things and it is perfectly natural—all little boys, they are interested in them, and there is a lot of wholesome recreation in the use of them in the proper way. And in my lifetime, it has happened at least three times that our nation has thrust guns in the hands of our young men and said, "Go abroad and stop our enemies." So, the mere possession of a weapon certainly is not a crime of any sort, but here is a man at 3 o'clock in the morning, sitting on the streets with two loaded revolvers in the glove compartment of his car. Well, I would say one loaded revolver and you could say a man might want to defend himself—two loaded revolvers and you could certainly believe he is going over to attack, he is not thinking about defending himself.

Well, that is not bank robbery, is it, however suspicious that may be. Now, at the police station, after these gentlemen had been taken down there, all this stuff is brought out. Now, you have seen the contents here. I might be inclined if you will be patient with me for a few moments, to review some of it. But first I want to remind you that each of these defendants, in the first instance, when he is called to account for the presence of these things, knows nothing about any of it or at least, about part of it, although it was all found together according to the officers and they make admissions about it only after it is demonstrated to them that the officers have found out something about where

[fol. 545] they got it. Then they change their story and admit it. Now, that is all before you. You are entitled to think about that in weighing whether this was an innocent or a guilty association of these defendants.

I could talk to you for more time than even your kindness and patience would endure about the contradictions between the statements of these gentlemen, both as to statements made to others, contradicting those they made here and as to statements made here before you contradicting other statements the same individuals made before you. In fact, I have never in one case seen so many contradictions. And you can weigh that in determining whether the association of these gentlemen was innocent or was guilty. I will not undertake, as I say, to give you any list of those.

I would point out, and attempted to point out just to satisfy my own conscience perhaps, for instance, take the matter of the trunk lid on that Buick. You saw that trunk lid. The defendant Sykes told you on the witness stand that that thing was damaged so that the metal had fouled the lid at the rear and it couldn't be lifted. And you saw the rear end of that automobile. You saw that trunk lid. You saw the place where something had struck the right rear—what would be the fender—I think it is all one piece [fol. 546] now, these automobiles as they now make them. Something struck the right rear of that car and instead of folding something over that trunk lid, it had actually, the way it was struck, had caused a wider gap between that right rear edge of the trunk lid and the other member on the other side and you heard the testimony of the man who sold that automobile, that he opened that trunk lid and looked in when he got the automobile. And this is another thing, because it bears on some statements of these gentlemen about not being able to get in that trunk and not knowing what was in there. He said that he looked in there and there was nothing in there, when he got the car, before he turned it over to them and he had it a very short time until he turned it over to them. Nothing in there but the spare tire and things that should be in the back end of an automobile. There was no pillow case, no cord, no license plates no stocking masks, nothing of that sort, shown to be in there.

Well, here is another contradiction. A great deal was

said and I say it is important in this way. Possession of a loaded revolver under Kentucky law might not be a violation of the law in a glove compartment, even though it was concealed, if the thing was locked so that you had to get [fol. 547] out a key and unlock the door before you could get to it. You know the law expresses itself as carrying on or about the person a concealed, deadly weapon and our courts have had some trouble interpreting that, but certainly, even though flipping the lid and grabbing a gun might cause the court to say that is a concealed and deadly weapon, if you had to unlock it, well the court might say that is not on or about the person because they might say because of the amount of preparation involved, you couldn't get at it readily enough to say that is itself an accessible, deadly weapon. That is an important thing. The defendants know that it was. They say the glove compartment was locked or either that or that they didn't know, that they just didn't look in it. The defendant Sykes says that glove compartment was locked and those pistols were found without forcing open that glove compartment, jimmying it open.

Now, this is one of the things I say—I am going to restrict myself in my reminder about contradictions in evidence—you saw that glove compartment, you were down there where you could walk around that car, that nice rich red panel on that door, with the bright chrome or nickel look, you could look around the edges, you could look at that [fol. 548] lock, there were no marks on that compartment door, not anywhere, there wasn't a dent, there wasn't a mark, there wasn't a scratch on it, and that is what Stricklen told you. There wasn't anything wrong with that when he sold it to him. There wasn't anything wrong with it when he got it back and that—discounting Stricklen, the car itself was before you and that is a contradiction to another of the details that these gentlemen tell you. So, the police officers, that they would like to discredit, said there was no violence to that door, that they just opened it and there was the door. They said it was jimmied open, some violence. You saw it and you know which story is true.

All right. I am not going to dwell upon the inconsistencies because I think it might be in a little degree an

affront to your intelligence. You have seen enough of this to know what was going on before you today.

Now, look at that. There is a license plate which could not be traced. If an automobile pulled up before a bank or near a bank so that it might be connected with a bank robbery, with that license plate, and somebody, some sharp-eyed citizen took that license number right quick, called the state police, "Mason County 824-101 was the tag on [fol. 549] the automobile that carried the men that robbed the Union Bank," and they would go to Mason County and what would they find? No such number. No such number. Now, if this was to be used for that purpose, it would have to be used under circumstances—they couldn't afford to go to a garage or filling station and have somebody take a screwdriver and make a change after they fled from the scene of the robbery. Look. Get out of sight and lift that off and the quickest and readiest means of sure identification of a vehicle that robbed the bank is done away with, done away with.

There is a little difference in the defendant Sykes' evidence and the evidence Mr. Joyce gave about the circumstances under which he got this .38 special revolver, Colt, in good condition. I would say, as an old gun crank, that it is quite likely has been polished off, maybe it was blued originally, and it has been repolished and a nickel finish put on it. However, that is not very important. The contradiction is whether he traded in a .25 automatic. Sykes said he did. Joyce said he didn't. Well, what is the difference? Well now, here is something you could think about. A .25 automatic is not much of a gun for serious [fol. 550] work. I heard some old hard head say, and I think, "If you want to start a fight, don't start it with a .25, because you will make some good man mad enough, shooting at him with that, that he will kill you before you get away." If you want serious work, you want more of a gun. Well, if he traded a .25, as he says, for this, he traded for a .38 special, which is the caliber most generally used by police officers all over the United States, a very respectable gun as far as power is concerned, much more so than the .25.

Now, you have got this little old .32 squeezer. See that handle (indicating). That is why they call it a squeezer.

It was loaded. It is not a powerful gun, but it is short, more of a gun than a .25 automatic, plenty gun to kill a man with. It has one distinction, there is no handle, no external handle on it. It is one of the few guns in the world that you can fire in your pocket any number of times and never have a jam, because you have got no handle to foul up in the coat lining. It is a gun that can be operated from a pocket, without any hitch or trouble, a good gun for a man who is going into—well, enterprises where he might need a gun.

I would like to call your attention to the three caps, four [fol. 551] caps, that have been the subject of so much evidence. I couldn't get the witness Strunk to tell you whether he first told the FBI officers that he didn't know anything about these two caps and later told them, admitted that he bought the caps, but the officers said that he denied everything the first time they talked to him, didn't know anything about anything. Later, when confronted with the statement of the circumstances under which he bought the caps, he came through with an admission that he provided these caps. All right. He bought two caps. He says he bought them for his brother-in-law, John Sykes, who was out of work, spent something like two dollars or something less than two dollars for the two caps. What did John Sykes or his brother-in-law Strunk want with two caps? Now, of course, they would say, well, they didn't know they had this although they were all found together in the same trunk. You saw the gentlemen try on these caps and you saw they could be fitted on any one of the defendants. You saw the gentlemen try on these caps which had been split at the back and they could go on the heads of anyone.

A Juror: Could I see either one of those caps that you have?

[fol. 552] Mr. Auxier: You object to our handing the exhibits to the jury?

Mr. Leggett: No objection.

The Juror: I just want one of those caps.

(Reporter's note: One of the caps with the split in the back was handed to the juror.)

Mr. Auxier: (continuing) You have heard the statements, you saw the demonstrations, ladies and gentlemen. Every

one of these caps would fit on the head of any one or every one of these men and not a bad fit at that and these caps that were cut, you could see would not have been much of a fit had it not been for the cut in the back of it, couldn't have been pulled down without that enlargement.

Now, what would caps have to do with a bank robbery? Well, it is like the automobile. If one has in his mind the notion of doing a bank robbery, he wants to establish an identity of the robber that he can change just like lightning if possible. He establishes his identity by anything conspicuous in the way of attire that will help him and what would be more conspicuous than a black and white checkered cap? Rob a bank with a black and white checkered cap or a blue and white linen checkered cap and dash away, get [fol. 553] out of sight, take that stuff off, ditch it and then he is a altogether different looking man.

Well, you know there is some evidence, some indication from the way the evidence is presented to you, that the defendant Strunk went in to buy one cap and bought two. Well, if he bought only one, there would have been one cap precisely for each member of the enterprise, assuming that they were planning something. And when they went beyond, they simply had a spare, which fit every one of them just as well as the others.

Now, you have gloves here. Now, what do gloves have to do with a robbery? Here is a pair of white canvas work gloves. Here is a pair of pigskin dress gloves. The important thing about gloves—now here is only two pairs of gloves—well, suppose only two men were going into a bank and didn't want to leave any fingerprints—the two men would need only two pairs of gloves. One man could stay with the automobile. One pair of gloves for each man that went in.

These little articles—I saw a demonstration (indicating stocking)—I will not try to convince you how these would improve my appearance.

[fol. 554] Although I wouldn't undertake to deny that they wouldn't improve my appearance, but they certainly would change it just as they changed the police officer who put on this mask, and one of the defendants who obligingly if later got it over his face and found that he was looking out through a hole when he got it on, and this patch came

across his face in a way that added to the difficulty of identifying him. Well, those are two little items. One is not made the same as the other, but I don't have to tell any of you people, you can see through that mask although it changes the shape of a man's face, changes so many things about him that it would be very, very difficult for anybody to identify him. But if among three men, two were going into a bank, two masks, stocking masks, or whatever you wanted to call them, would be all that would be needed to do the job and there they were.

Well, there are other items, in the package with the pillow cases, band-aids, a razor that according to the testimony was found on the person of the defendant Preston. And here are the cartridges, .32 and .38 that were in the two hands guns, and a pillow case. What would a bank robber want with a pillow case? Well, money, paper money is rather bulky. If a man is going to carry a whole lot of it, he is going to have to have some sort of container. What [fol. 555] better container than a pillow case, which is light, woven closely enough that not anything, not even the smallest coin would get out of it. Small enough actually so that it could be burned, destroyed or hidden in a short time if given a little space of time and be folded up in a very small package. What about the cord? Well, I believe Sykes said that he was a fisherman and fishermen do use a similar cord. I remember when I was a young buck they called a cord about like this a trot line, or staging line. Stretch a long line of it across the stream and drop lines with hooks and bait on them and go back the next day and take off the fish. Well, there is not enough here to set out a trot line. There is not enough here to put enough drop lines to equip a trot line with hooks. It is not a very likely outfit for fishing. You saw the demonstration about the strength of this line. The witness—I believe that was Sykes—took hold of it and he did his best and he is a fairly husky looking lad and he couldn't break it. And I can't break it and I am fairly husky for a feeble old fellow. That is strong. It is not very big and if you would want to tie up a banker while you made your getaway, this little, flexible line, why the knots are so much harder to untie than a rope or a bigger line and would hold very securely. A [fol. 556] man can't break it. An effort to pull loose

causes it to cut in the flesh, painful. Well adapted to rob a bank. And enough line—I don't know how many they had working in that bank, somehow or other I don't think we got in how many employees aside from the cashier. If there was only the cashier, why they had enough line to tie him hand and foot and hang him besides. Here is a spare length and here is one that was on the person of the defendant Preston, a line with the loop on it. That could be drawn tight on a fellow, could be used to choke him if necessary, control him pretty well. That has its uses.

All right, now. There isn't any doubt that these gentlemen had the equipment in there and enough of them admit their participation in gathering and accumulating enough of it that there is none of them that by the evidence before you and their own admission didn't contribute something to this equipment. The defendant Preston admits that he told a tale to the owner to get the automobile. The defendant Strunk admits that he bought the caps that are found in the loot. The defendant Sykes admits that he provided both the pistols.

Now, we have reached the point where it is plain enough, [fol. 557] every item of the equipment was available for a man. We have reached the point for a bank. There was a bank in such a situation that its cash on hand, cash in the bank in the form of currency was at the highest point in the year, a bank without an alarm system in a town without a police system. Well, there has to be more than that, surely. Now, is there more than that? Well, early in our discussion we pointed out to you that by their own admissions, by uncontradicted evidence, these three defendants associated together and were seen in the Depot Cafe. Now, we brought before you the witness, Billy Monroe, who said he was the bartender just out of jail, in the Depot Cafe. I am sure that you can see—it didn't take any great experience—that Billy Monroe was not a willing witness for the government. Everything we got out of Billy we got against his will and only after he had been pinned and cornered to the point where he felt like he had to take his choice between committing a willful perjury and making an admission. Now, he was asked if he heard these three defendants together in there talking about this

robbery and he denied it. And he was asked some more and he still denied it. After referring to his statement and being reminded that on the occasion he had heard them [fol. 558] talking about this big robbery down in Berry, and had said, "I am going to get it before you do," and being hedged in, finally with the exact facts, he was asked, "Now, did you hear that? Did you make that answer to them?" and he said that was it. That was it.

Now, that is evidence that doesn't depend on one of these defendants. There are admissions on the part of these defendants, damaging admissions, but that is one that you can consider affects every one of them, because they were all together and you can consider it all the more seriously, because that witness was certainly unwilling, he was certainly the defendants' friend and not the friend of the government.

Now, as far as the others are concerned, I don't think I need remind you, every one of these defendants admits to you on oath here in your presence that he talked about a bank robbery in the Depot Cafe, and about the time the government says they planned this. Now, he did not get on there and admit—he has pled not guilty—every one of them—he is not going to get on there and say, "Yes, we planned to rob the bank of Berry and we were arrested before we could get the job done," but he did admit and remember this, he admits that they talked about it. In fact, the way they talked about it—you know, a man can't [fol. 559] conceal the inner workings of his own heart. How do they talk about a bank robbery, every one of them? Why, they considered it. You can go to an honest citizen that you know of and say, "Let's go rob a bank." If he thinks you are serious, "Get out." No considering, debating whether it was a crime, whether you would consider it. No, there would be no consideration of it at all. Every one of these defendants by his admission, by his attitude before you, admits, shows to you, proves to you that when a bank robbery is offered to you, he thinks it over, he thinks it over, he considers it, the way you would a business proposition. Now, whose business is bank robbery—whose business is bank robbery—except a bank robber.

Now, I can't recall all of the evidence. I can't remember

as much about it as you can. I can't detail the contradictions. I can't recall the contradictions in the evidence of these defendants like you can, which prove that what they were telling you in their own behalf is false. I will leave it all with you, but bear this in mind, we have the bank, according to a bank robber's view, ripe to pull off a job. We have the three people associated at the time and place. We have every item of the equipment. We even have the [fol. 560] escape route figured out in detail, admitted by one of them in detail, and it is a good one, it's a smart one, no travel at all on the main thoroughfares. We have three defendants who admit at the time and place—now, that is their admission—at the time and place, they were approached about this, discussed and considered a bank robbery. And we have the evidence of more than one of them and of Billy Monroe, supported by the evidence of Mr. Hutton who saw two of them down there, the one who didn't have the mustache that he now has, and all these things to be used in the robbery of the Bank of Berry.

It is your responsibility.

The Court: Members of the jury, I am going to give you a brief recess before we conclude the case.

Bear in mind all admonitions heretofore given. Do not discuss this case or permit anyone to discuss it with you or read anything about it at all until we reassemble here and do not make up your minds about it until we reassemble here to conclude the case.

Mr. Marshal, you may announce a 10-minute recess.

[fol. 561] (Reporter's note: The court recessed for 10 minutes. At the conclusion of the recess, the defendants were present with counsel, all of the jurors were present, and the following occurred:)

COURT'S INSTRUCTIONS TO JURY

The Court: Members of the jury, this case is a little different from any of the cases you have tried or have heard. This is a case in which the defendants are charged with entering into a conspiracy to rob the Union Bank of Berry. A conspiracy is best defined by calling it an agreement. The word "conspiracy" is a legal term and yet it is pretty

commonly understood I think, but it is an agreement between two or more persons to do an unlawful thing or to do a lawful thing in an unlawful way. The charge in this case is that these defendants had an agreement among themselves to rob the Union Bank of Berry.

Now, the statute on a conspiracy says this, if two or more persons conspire to commit an offense against the United States, or any agency thereof, and in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, they are guilty of violation of this statute.

There must be an agreement or a meeting of the minds [fol. 562] and then some one act after that agreement is had, not before, but after that agreement is had, if any one of those who have entered into that agreement do some one act to carry out the object of the conspiracy, then the offense is completed. If you believe that these defendants, or any two of them, did that, then they are guilty and you ought to find them guilty if you believe that fact to the exclusion of a reasonable doubt as I shall define that term to you.

I think I might best describe it by an illustration. Let us say that there are three persons just get together and say, "We are going to rob a bank," and one of them after they have had a meeting of the minds, one of them goes and buys a pistol or secures a pistol or secures some instrumentality, an automobile or any other thing, for the purpose of carrying out the conspiracy, then the crime is completed, even though they may never carry it out.

Now, these defendants are not charged with robbing the Union Bank, but they are charged with conspiring to rob the Union Bank of Berry and the indictment says that they entered into this conspiracy and that they did certain well-defined overt acts, more than one, to carry out its object, therefore the crime is completed and the defendants are [fol. 563] guilty as charged in this indictment.

Now, there are certain well-defined rules of law which I want to call first to your attention. I want to make this instruction as brief as I can and as sharp an issue as I can for you to decide. It is not complicated. I have to use a lot of language in these instructions but the gist of the case is well-defined, it is not complicated, it is something that

you can easily decide, or at least, you can understand and should be able to make a verdict.

In the federal courts, the judge is permitted and sometimes it is his duty to comment on the evidence. I don't know that I shall do that, but if I should, it is only with the purpose of attempting to assist you if I may in reaching your verdict. You are not to accept what I may say as all of the evidence or all of the evidence on a given point. You are not to accept it as all of the important evidence. You are not to necessarily accept it as true. You are the triers of the facts and it will be for you to use your own recollection, your own reasoning, and your own intelligence as to what the evidence was and the pertinent and significant inferences which may be drawn from the evidence.

[fol. 564] Now, each of these defendants is entitled to the presumption of innocence. That presumption of innocence starts with him at the beginning of the trial and remains throughout the trial of the whole case. It must be overcome by evidence and before he can be found guilty as charged in this indictment, you must believe to the exclusion of a reasonable doubt that he has been proven guilty. And if you have a reasonable doubt of his having been proven guilty, you ought to find him not guilty. That applies to all of the defendants collectively and applies to each of them as individuals.

A reasonable doubt, as I have defined that term to you or in your presence, I believe this week, on more than one occasion, means just what it says. It is best defined by a use of the term itself. A reasonable doubt is a doubt based upon reason, not some inconsequential doubt, not some mere, slight hesitation that might enter into the mind of a juror, but such a doubt as would guide you in determining the ordinary affairs of life. Use your common sense in that connection. And the United States is required to prove its case beyond a reasonable doubt, it is not required to prove its case beyond all doubt. Few things are capable of proof to absolute certainty, so the term reasonable doubt means just what it says and if it [fol. 565] were not so defined, it would be practically impossible to enforce the criminal laws. If on the whole case you have a reasonable doubt of the defendants or any of them having been proven guilty, then you should find those

defendants or that defendant to whom you entertain such reasonable doubt, not guilty. You may find two of them guilty and one of them not guilty, you may find all of them guilty or all of them not guilty. You cannot find one of them guilty without finding at least one other guilty. There must be in this case, under the record here, more than one person. The evidence here in this case requires that you find two of these named defendants—it is possible to have a conspiracy with a person who is not named in an indictment, you can try a person, one person, on a conspiracy if some other person unknown to the grand jurors or some person may not be present, some person who is named but has not been indicted or is not accounted for. A person can be tried, a single person, on a conspiracy if it is alleged in the indictment that he conspired with some other person, but this indictment here charges that these three defendants and one named Clark, who is not here, entered into a conspiracy, but the evidence does not sufficiently implicate Clark for you to consider him as a conspirator under the [fol. 566] record here. So you must find at least two of these defendants, either all of them or at least two of them, because one of them cannot be guilty under the record as it stands.

Now, a unanimous verdict is required. I think I have gone over this with you before, in other cases. You can't reach a verdict by holding a primary election. You can't reach it by drawing straws or casting lots or taking any percentage of the number of jurors. It must be the verdict of each juror, in his own mind, what the verdict should be and then you take the collective minds of the jury and if each mind agree, then you can return a verdict. However, before you reach your definite conclusion, or as we might say, before you reach the place of no return, you should give due regard and consideration to the reasoning and recollection of your fellow jurors. You should not necessarily be overpersuaded, but if the great majority felt that the evidence pointed to one conclusion, you should give due consideration to that fact, because the jury is composed of 12 persons, not one or two, or any less number.

And bear in mind that I think it can be well said that I believe you, being here together this week, must realize that the Court has every confidence that each person on

[fol. 567] that jury wants to do the fair and the just thing, because that is a reflection not only upon yourself, but it is a reflection either to the credit or the discredit of the court, and I am sure that each person on there is as conscientious as the man or woman sitting next to him. So just bear in mind that before you finally, conclusively make up your minds, that you will take an open-minded view of it and rationalize and be reasonable and objective and detached in your discussion. I have no disposition to require you to make a verdict. I wouldn't if I could and I couldn't if I wanted to.

I have no interest in who wins this case. If I have given any indication—that is one thing that concerns me—I try throughout the trial of any case, either civil or criminal, not to give a suggestion either by expression or countenance, comment, in any way to indicate a preference, because I have none. I am only concerned with one thing and that is that any judgment which goes out of this court shall be a fair and a just judgment. I am very jealous of that fact. You make the verdict and I must enter the verdict. The court must depend upon your fairness, your intelligence, as to what that verdict, that judgment will be, because it [fol. 568] will on your verdict.

Now, there was a statement made here, a question asked as to whether or not the defendant Sykes had been guilty of a felony and then he said he had not. Then the District Attorney asked him if he had been convicted of carrying a concealed weapon. Now, the question has arisen whether or not in the State of Ohio, where that is impliedly or I believe admittedly took place, whether or not that is a felony under the laws of Ohio, but I want to give the benefit of the doubt in that case to the defendant and you are expressly instructed not to give any consideration at all to that fact. You are to treat the defendant Sykes as if under no condition had he ever had any other offense or any other charge brought against him. He is entitled to that and you are to disregard any reference to this matter of carrying a concealed and deadly weapon at some time or other in times past in Ohio.

Now, there were certain statements made to officers of the government, which the defendants have admitted that they did make certain statements and these officers of the

United States, FBI agents, and possibly police officers have testified about here, what some of these defendants or one or more or all of them said to them at varying times. I [fol. 569] tried to admonish you on each occasion that you should not consider any statement made by a defendant which was made in the absence and not in the presence of his co-defendants, as having any bearing whatsoever upon the guilt or innocence of any person except the person who made the statement, if you believe it was made and if you believe that it did affect his guilt or innocence. I think you understand the purpose of that, I want you to. So far as these other defendants are concerned, aside from the one who made the statement, that is merely hearsay evidence and what he says, what somebody said that he said is not competent for the person about whom the statement may have been said or may be involved in the statement in some way without an opportunity—he has had no opportunity to deny or explain it. So you are not to consider any statement which you may have heard any witness testify that one of the defendants made as in any wise affecting the guilt or innocence of any defendant except the one who made the statement.

Now, the United States in this case, as in many cases, in fact, in practically all cases I would say, is dependent to establish its case upon circumstantial evidence. Circum-[fol. 570]stantial evidence is evidence which is introduced by showing from the witness stand numerous, varying circumstances, which have been ascertained and brought to your attention. It would be, as you can well understand, impossible to enforce the law if the United States had to have an eyewitness of unimpeachable integrity to each element of a crime. Things like that from a practical standpoint don't happen and I have heard juries say sometimes, sometimes jurors say, "Well, he was guilty but they didn't prove him guilty." Now, you can't conscientiously and intelligently make that statement. If a juror goes into a jury box and says after hearing the case and the whole thing through, "The defendant was guilty," he must necessarily have been proven guilty, because when the juror went into the box he said he had never heard of the case before. And so the United States is relying here in this

case upon a chain of circumstances, an item here and an item there, and a fact here and a fact there, to establish what the government contends is a chain of circumstances that is equally as binding as the most direct and positive proof and it is for you to take into consideration your own experiences in life and your common sense in judging such things as to what these facts are and what inferences can rationally be drawn from them. However, before the de-[fol. 571] fendants can be found guilty on circumstantial evidence, it is necessary that their guilt be established to your satisfaction to the exclusion of a reasonable doubt.

You will elect one of your number foreman and the foreman will sign the verdict for the jury. Now, I believe I have given you in some detail the general principles of law which you are to apply and they apply to each defendant, to all defendants and to each defendant.

A conspiracy does not mean that they had to have a writing, that of course would be extreme. There have been cases of that kind I suppose, but they are relatively rare in the history of the law. It does not necessarily mean that these defendants should all have sat down around a table or have stood together at one particular time, but if during the course of affairs there was a meeting of their minds and they all joined together in a common purpose—maybe the idea originated in one mind, usually ideas are not spontaneous in more than one mind at one time—if the idea originated in one mind and later on, at another time and another circumstance, the other defendants had the same idea and they joined in that common purpose and there was a common understanding that they were to carry [fol. 572] out this act of robbing the Union Bank of Berry and that after they had had that common understanding or that meeting of the minds, and they all three had their minds made up to do that thing collectively, together, if you believe that any one of them then committed any of these overt acts, that is, whenever this occurred, it is charged to have occurred here between December the 10th, 1960, and the 20th of January, 1961, at any time during that period if there was a common understanding or a meeting of the minds to rob the Union Bank of Berry and any one of these things was done to carry out and further

the object of that conspiracy, and you believe that fact to the exclusion of a reasonable doubt, the defendants are guilty and you ought to find them guilty; if you do not so believe or if you have a reasonable doubt of their having been proven guilty, you ought to find them not guilty.

These are the alleged overt acts;

"1. On or about December 10, 1960, John Richard Sykes purchased a .38 caliber pistol from Elmer Joyce Gun Shop, 405 Madison Street, Covington, Kentucky."

"2. On or about January 18, 1961, Kenneth Strunk purchased from Bernard M. Hedges, proprietor of a general store, Berlin, Kentucky, two caps to be used as a part of [fol. 573] disguise.

"3. On or about January 17, 1961, John Brenton Preston and John Richard Sykes by deceit procured from Vincent Stricklen, used car dealer, Newport, Kentucky, an automobile to be used in the robbery, which car was purchased on January 19, 1961, by John Richard Sykes in the name of his wife, Elizabeth Sykes.

"4. On or about January 20, 1961, John Richard Sykes, John Brenton Preston and Kenneth Strunk had in their possession a falsely made Kentucky license tag, two pistols, a stocking mask, four caps, pillow cases, ammunition, two pair of gloves, rope and cord, paraphernalia to be used in the execution of said bank robbery.

"5. On or about January 8, 1961, John Richard Sykes and Kenneth Strunk were in Berry, Kentucky for the purpose of observing said bank."

If you believe that any one of those things was done after the conspiracy was entered into, to carry out its purpose and carry out its object, that has made out the offense, if you believe that fact as I have said to the exclusion of a reasonable doubt.

Now, briefly, the theory of the United States is this: That these three men, friends, acquaintances, loafing around [fol. 574] a cafe or saloon, out of employment, and the idea came up through some circumstance that they would rob this bank at Berry; two of them at least went there, on at least one occasion, and looked the thing over, laid out a plan, went and got a car, got two pistols, one for each

of those who would enter the bank, two to enter the bank and commit the robbery, one to drive the car, and have it ready to get away, two pillow cases, two masks, a bogus or counterfeit license plate to cover up the real license and then be discarded; all of these things entered into their plan and they were found with the equipment, the material, ready to carry out the job, at 3 o'clock on the morning of the 20th of January, and that it was their intention. They build up here from several witnesses the chain of circumstances on which they rely, statements of the defendants themselves to officers, statements of other witnesses, and that chain of circumstances which the United States says, while they are all just a series of circumstances, they point unerringly to the guilt of the accused and that they have, with those circumstances and all reasonable inferences which may be drawn from them, made out a case which shows conclusively and to the exclusion of a reasonable [fol. 575] doubt that these defendants and all of them are guilty of entering into a conspiracy, committing at least one act, if not more, to carry out its object, to rob the Union Bank of Berry during this time, between December the 10th, 1960, and January the 20th, 1961.

Now, the defendants, on the other hand, say that they never had any such idea as that, that only one of them was ever approached with such a thing, it was so fantastic the other two would not even touch it, and when the subject was broached to them, to Strunk and Preston, they immediately told Sykes that he was a fool to even consider any such thing and they completely abandoned it and all their acts after that time, they never took any steps toward doing anything like that at all, all their actions since then were entirely unrelated to such idea. Sykes says, on the other hand, that such a question was suggested to him by some other people, another person, and other people, but after he talked to his two friends, they talked him out of it and he got cold feet, as he said—I think he used those words—and abandoned the whole idea and there never was any such positive agreement between him and anyone, the defendants or anyone else, to actually do the act which this indictment alleges, and that these matters which are ex-[fol. 576] plained by these defendants as being the normal

acts which people in their station in life and under the circumstances would do without any intention of anything wrong.

Now, ladies and gentlemen, I think that briefly is the theory of both the United States and the defense. I may have left out some material thing that you have in mind, but you are not to accept my conclusions but your own. I only call your attention to those things in an endeavor to assist in arriving at a fair verdict.

And so if you believe from all of the evidence and all reasonable inferences which may be drawn from the evidence that beginning on or about December 10th, 1960, and continuing up to and including January 20, 1961, in Campbell County, in the Eastern District of Kentucky, and in other places to the Grand Jury unknown, John Richard Sykes, John Brenton Preston, Kenneth Ray Strunk, the defendants herein, did wilfully, knowingly and unlawfully combine, conspire and agree with each other to commit an offense against the United States, to-wit, to rob the Union Bank of Berry, Berry, Kentucky, the deposits of which were insured by the Federal Deposit Insurance Corporation under Certificate No. 5851, an offense prohibited by Title 18, Sec. 2113, United States Code, and in furtherance of the [fol. 577] conspiracy and to accomplish its objects they committed one or more of the overt acts which have been read to you here and which I read to you a few moments ago, and you believe that fact to the exclusion of a reasonable doubt, then you should find those defendants to whom you entertain no such reasonable doubt guilty as charged in this indictment. If you do not so believe or if you have a reasonable doubt of the defendants having been proven guilty, you ought to find them not guilty.

A unanimous verdict is required. Elect one of your number foreman and the foreman will sign the verdict for the jury.

Now, gentlemen for the United States, do you have any exceptions to the instructions?

Mr. Meade: Nothing further and no exceptions.

The Court: Gentlemen for the defense—you may approach the bench if you have.

(Reporter's note: The following occurred at the bench in the immediate presence of counsel and the Court, out of the hearing of the jury:

Mr. Elfers: I think there should be an instruction as to the theory of abandonment of the conspiracy, if any. [fol. 578] The Court: What evidence is there to justify such an instruction?

Mr. Elfers: Well, we have one, for example, who withdrew as soon as the subject was broached to him and we also have Mr. Preston who did the same.

The Court: They say they never did join it. You can't abandon something that you have never joined.

Mr. Elfers: Well, the government is contending that they did.

The Court: What?

Mr. Elfers: I say the government's proof is that they did enter into the conspiracy right then.

The Court: Well, I think the defense of abandonment is in the nature of a confession. You admit, "Yes, I joined the conspiracy, there was a conspiracy, but if I was in one, I abandoned it." But these men say they never had engaged, entered into it at all. I will give the instruction just out of an abundance of precaution, but I really doubt the propriety of it under this state of case.

[fol. 579] Mr. Meade: Especially when there are facts showing that up until January the 20th, they had in their possession all of these items at that time.

Mr. Elfers: One—not they.

The Court: Well, I will give it out of an abundance of precaution.

Mr. Leggett: I think the Court might consider the fact that Sykes did state that he went down there and then abandoned the project when he saw the police and I think that would warrant giving it just on that state of the evidence alone.

The Court: He said that when he saw the police he was afraid there was too much police force down there or something like that, and wait until another day or something like that. I don't recall what it was. But I will give the instruction.

Is there anything else?

Mr. Elfers: There is one federal case that states that a conspiracy if any must exist prior to any overt act.

The Court: I told them that, after the conspiracy. They have to believe the conspiracy is in existence and believe that these things were done to carry out the conspiracy. Of course—well, let it go at that, I think it is clear enough. [fol. 580] There is a time when they may join a conspiracy. A conspiracy may cover several years and a lot of things done about it, various ones come back into it, an overt may have been committed back there by some two of them. But I think that is sufficient. A couple of times I had it in mind to do that because I believe under the facts in this case they are entitled to that instruction because I think the getting of the pistol back on December 10th—I don't know—I wouldn't say there isn't evidence but it is certainly vague as to when these fellows first had any contact with each other, except Strunk and Sykes were brother-in-laws. Anyway, I am not going to give any further instruction on it.

Anything further, Mr. Elfers?

Mr. Elfers: That is all.

Thereupon the colloquy at the bench ended.)

The Court: Now, members of the jury, there is one other matter in the law of conspiracy which I should instruct you on. If you believe that the conspiracy was formed and these defendants went into a conspiracy but later abandoned that conspiracy, in other words, that a person had joined a conspiracy and then left it, before its objects are carried out, and you have a right to consider that in determining whether or not he is guilty to the exclusion [fol. 581] of a reasonable doubt. The government in this case contends that they did not abandon any conspiracy because they were all together on the night they were arrested, and the only thing that made them abandon it is that the officers took them in custody. That, however, is a rule of law and you may consider that in determining the guilt or the innocence of any one or all of the accused.

Now, is there anything further for either side?

Mr. Elfers: (Indicating in the negative).

The Court: Very well. Mr. Marshal, you may show the jury to the room to consider the case. Just write your verdict on the back of the indictment.

Just one other thing, I suppose that there is no objection to the jury taking the exhibits to the jury room with them?

Mr. Leggett: No objection.

The Court: You can take the exhibits with you.

(Reporter's note: The jury retired from the courtroom to consider the case. Subsequently, on the same day, to-wit, [fol. 582] March 18, 1961, the jury returned into the courtroom, the defendants and their counsel being present, and the following occurred:)

The Court: Call the jury, Mr. Clerk.

(Reporter's note: The names of the jurors were called by the clerk.)

The Clerk: All answer, Your Honor.

The Court: Read the verdict, Mr. Clerk.

VERDICT

The Clerk: "We, the jury, find all the defendants guilty as charged." Signed "Troy C. Russell, Foreman".

The Court: So say you all, members of the jury?

Just find seats in the back of the courtroom please.

Let the defendants come around.

(Reporter's note: The defendants came before the court with their counsel. Pre-sentence reports were given to the Court by the probation officer.)

The Court: John Brenton Preston, do you have anything to say before judgment of the Court is pronounced in your [fol. 583]-case, either of you or your attorneys, anything you want to say?

The Defendant Preston: Nothing other than I would like to have consideration for the time already spent in jail, sir, nothing other than that. I might add that my wife is in bad condition with polio. I would like for you to consider that, that and her pregnancy state.

The Court: John Richard Sykes, do you have anything to say before judgment of the Court is pronounced in your case, you or your attorneys?

The Defendant Sykes: No, sir.

The Court: Kenneth Ray Strunk, do you have anything to say, you or your attorneys before judgment—

The Defendant Strunk: No, sir, I don't.

The Court: (continuing)—is pronounced in your case?

Mr. Leggett: If the Court please, in regard to the last two named defendants, I would like to draw the Court's attention to the fact that the defendant Sykes has no criminal record showing convictions of any felonies. With respect to the defendant Strunk, he has no criminal record [fol. 584] whatsoever. He is a married man and he has—even though unemployed, has job opportunities offered for him.

The Court: Thank you, Mr. Leggett.

(Reporter's note: There was a pause in the proceedings while the Court examined the pre-sentence reports.

The Court: Now, unfortunately, these records that you say this man does not have are not borne out by the investigation, because the record shows that John Richard Sykes has a long criminal record.

Mr. Leggett: It is my understanding he has never been convicted.

The Court: He has never been convicted in federal court, but he has been continually in trouble, almost continuously since 1953, in one form or another, everything from auto theft at Cincinnati, Ohio, a charge against him, carrying concealed and deadly weapons, breaking and entering, leaving the scene of an accident, held for the army on a drunk charge, and just generally engaged in some kind of vice or lawlessness. Now, some of those matters were not prosecuted to final conclusion.

(Reporter's note: The defendant Sykes holds up his hand.)

[fol. 585] The Court: He had hung juries twice, I believe, on his breaking and entering charge, paid a fine for carrying concealed and deadly weapons, investigated on another occasion and released and then held on auto theft in Cincinnati. Released, investigation of the probation officer at Fresno, California, now holds a misdemeanor check warrant for this man and the Fresno County sheriff's office holds a misdemeanor traffic warrant for him. He gets around. He

is not located just in this Newport area. He gets around. John, you held up your hand. Did you have something you wanted to say?

The Defendant Sykes: Yes, sir. That car theft, I am not guilty of that. I didn't—they ain't never arrested me for no car theft; that is on somebody else's record by the name of Sykes. That is not mine.

The Court: Well, on May the 21st, 1956, auto theft, Cincinnati, Ohio, and you were released on the charge.

The Defendant Sykes: No, sir. I was not arrested on that. That was not me.

The Court: Were you before the court in some way on [fol. 586] that?

The Defendant Sykes: No, sir.

The Court: All right. Take that one out. That still leaves a good many others. The trouble about it, John, is that you apparently from your own testimony were sort of the instigator of this thing and that would imply that you were—now, here is a picture of you before the Cincinnati police department with your number and all.

The Defendant Sykes: Sir, that was on that concealed weapon and that burglary and grand larceny and another time I was in jail over there for letting a man drive my car without a license.

The Court: Well, burglary, you were up for burglary.

The Defendant Sykes: Burglary and grand larceny, yes, sir. And I got two hung juries on that and they dismissed it and that was in 1957.

The Court: Now, as to John Brenton Preston, he has a long record. I am talking to you about these things because if there is any error in it, I want to know about it. John, the record here shows that you were committed to the federal reformatory at Chillicothe, for four years, by a military court, for escape, desertion and assault; also in [fol. 587] Cincinnati in 1954 for armed robbery, which was dismissed; you were held in Marion, Ohio, for inquiry and you were sentenced to one to 20 years in the Ohio State Penitentiary on a charge of forgery and uttering forged instrument and attempt to escape jail. And then again in 1960, disorderly conduct, sentenced to six months in jail in Columbus, Ohio. And you were before the court at Frankfort, Kentucky, for grand larceny but no disposition has

been made of that case. And you were before—now, they are some of the matters which have been brought to the attention of the Court.

The Defendant Preston: Your Honor, that is true, but for one exception, I was never in Frankfort, Kentucky, in police court, never. The rest of that I will admit.

The Court: Grand larceny, that would be in the circuit court.

The Defendant Preston: Anywhere in Frankfort.

The Court: Any court in Frankfort?

The Defendant Preston: Any court in Frankfort.

[fol. 588] The Court: Very well.

You were dishonorably discharged from the Army and have a very poor work record. I can't find where you have ever done any work very much of any kind. Our probation department makes a very thorough investigation of the background of these men before they are sentenced and I know that they are correct, unless you tell me to the contrary. I have to accept it.

Now, I am not sentencing you men, you understand, on those. You have already paid your penalty for that. I am not sentencing you on that, but it is a circumstance that the Court must consider. I feel properly so, on your being sentenced on a serious charge. This is a very serious offense.

Now, Kenneth Ray Strunk, you have a long and serious record, is that right—police record?

The Defendant Strunk: I don't believe so, sir.

The Court: You don't? Starting back in '53, Cincinnati, Ohio, disorderly conduct, carrying concealed weapons. You were fined and costs. 1954, Air Force—I don't know just what that means—discharged. You were held in Atlanta, [fol. 589] Georgia, as a material witness for the federal authorities in 1957. You were before the court in Cincinnati, Ohio, for stealing an automobile in 1957. This case was dismissed at the request of the prosecuting witness. You were also held at Norwood, Ohio, in 1958, on investigation but were released. In 1958, Cincinnati, Ohio, reckless driving, you were fined \$19. In 1958 you were arrested and convicted in Norwood, Ohio, for assault and battery; 1957, Cincinnati, Ohio, disorderly conduct; 1954—going back to 1954—you were released to the Army on a charge

in Cincinnati, Ohio; 1957, failure to provide for a pregnant woman.

Are those items correct?

The Defendant Strunk: The failure to provide is—I was arrested for that and my wife didn't press charges and we were separated at the time; and the drunk and disorderly, I was released for that and released for the court costs I believe. And carrying a concealed weapon and disorderly conduct, I thought was only disorderly conduct. I received a \$5 fine and court costs. I believe.

The Court: What about the assault and battery?

[fol. 590] The Defendant: In Norwood, that—I don't know whether—where that could possibly have come from. I have a first cousin with my same middle name. He has been mistaken for me before.

SENTENCES

The Court: It will be the judgment of the Court that each of you be sentenced to five years in the penitentiary on this. Now, I might say, you are fortunate, because that is the maximum sentence under this charge, the maximum prison sentence. There is a fine that could be added to that, but there is no point in that. On a conspiracy charge the maximum sentence is five years.

The Defendant Preston: Do you determine where we are sent?

The Court: No, sir. That is a matter which addresses itself to the Attorney General; possibly the marshal can give you some idea. He will eventually determine it, but I have nothing to do with it.

Mr. Elfers: Your Honor, in this sentence have you considered the time they have spent in jail?

The Court: I have considered that. They were taken into custody January the 20th, which isn't very far back. [fol. 591] They haven't been in jail very long. They have stayed in jail for that length of time. I have taken that into consideration. I haven't taken anything off. If I could give them more time, I think a longer sentence would be justified. I think they are fortunate.

Do you have any objection to these exhibits being returned to the FBI agents, subject to the orders of the court?

Mr. Leggett: We have no objection, Your Honor.

The Court: The reporter doesn't want the responsibility of them unless there is some reason why she should keep them. Let it be agreed then by all parties—is that agreeable with you men that these exhibits be returned to the FBI agent?

The Defendant Sykes: Well, wouldn't my wife be allowed to have my gun back since it is registered in my name?

The Court: Your pistols?

The Defendant Sykes: No, the one that is mine, the .38 [fol. 592] The Court: Well, I suppose she would. I don't know what your rules are on that situation. What do you have to say, Mr. District Attorney?

Mr. Meade: There is still one other defendant to be tried, Your Honor.

The Court: Well, let them be held by the FBI, then eventually if there is another defendant, if it is finally disposed of, you can take that up with the District Attorney's office. You can be assured that they will give you whatever the laws allows on it.

Custody of the marshal.

[fol. 593] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 594] IN UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 14670

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, KENNETH
RAY STRUNK, Defendant-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS—Filed February
10, 1962

[File endorsement omitted.]

[fol. 595]

STATEMENT OF QUESTIONS

(1) Should the District Court have sustained the motion of the defendants-appellants to suppress evidence, filed before commencement of the trial?

The District Court said "No".

The answer should have been "Yes".

(2) Should the District Court have sustained the motion of the defendants-appellants to exclude the statements made by defendant Sykes which were in the nature of a confession?

The District Court said "No".

The answer should have been "Yes".

(3) Should the District Court have sustained the motion of the defendants appellant to enter judgment of acquittal at the conclusion of evidence of the plaintiff-appellee?

The District Court said "No".

The answer should have been "Yes".

(4) Should the District Court have sustained the motion of defendants-appellant to withdraw a juror and to declare a mistrial?

The District Court said "No".

The answer should have been "Yes".

[fol. 596]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 14670

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, and KENNETH RAY STRUNK, Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Kentucky

OPINION—Decided July 23, 1962

Before: MILLER, Chief Judge, SIMONS, Senior Circuit Judge, and DARR, Senior District Judge.

MILLER, Chief Judge. The appellants, John Richard Sykes, John Brenton Preston, and Kenneth Ray Strunk, were found guilty by a jury in the District Court of conspiring to rob the Union Bank of Berry, Berry, Kentucky, a state bank insured by the Federal Deposit Insurance Corporation, in violation of Sections 371 and 2113, Title 18, United States Code. There was no count charging the substantive offense of robbing the bank and, in fact, the bank was not robbed. Each appellant received a sentence of five years imprisonment.

At the trial, the Government introduced evidence showing the following facts.

On or about 3 A.M. on January 20, 1961, police officers of the city of Newport, Kentucky, went to 10th & Monmouth Streets in Newport in response to a call stating that there were three men in an automobile which had been parked there since 10 P.M. They questioned the men, who gave [fol. 597] evasive and unsatisfactory answers as to why they were there at that time of night. One said he hadn't worked for six months and the other two said they hadn't been working. They had twenty-five cents in money among

the three of them. The officers arrested the men, who are the appellants in this case, placed a charge of vagrancy against them, and impounded the automobile. In searching the automobile the officers found two loaded revolvers in the glove compartment of the car, and an additional charge was placed against the appellants of carrying a concealed and deadly weapon. In a further search of the automobile the officers found in the luggage compartment two ladies stockings with upper half tied in a knot at the end, one with eye holes, a license plate for Mason County, Kentucky, which had been illegally manufactured and which had small hooks attached to it which would permit it to be hung over another license plate, two pillow slips, two pieces of rope, a length of fishing cord, gloves and four caps, two of which had been cut so they could be pulled further down on the head. The case having been adopted by the United States Government, no disposition was made of the two charges in the Newport Police Court.

Appellants moved in the District Court to suppress the evidence concerning the articles found in the car. The District Judge, after hearing the evidence concerning the arrest of the appellants and the search of the car, overruled the motion.

Appellants contend that the motion to suppress evidence should have been sustained in that it was obtained through an illegal search of the automobile without a warrant. Although there was no warrant for the search of the automobile, the Government contends that the search was legal because it was incident to a lawful arrest. Under this well established rule, a search without a warrant is dependent initially upon a lawful arrest. *United States v. Rabino-witz*, 339 U.S. 56, 60; *Johnson v. United States*, 333 U.S. 10. Accordingly, we direct our inquiry to the question of whether the arrest was lawful. In the absence of an applicable federal statute the law of the state where an arrest without warrant takes place determines its validity. *United States v. Di Re*, 332 U.S. 581, 589; *Miller v. United States*, 357 U.S. 301, 305.

Appellants contend that since the charges in the state [fol. 598] court were not pressed and there has been no judgment of conviction thereunder, it has not been estab-

lished that the arrest was lawful. On the other hand, the appellants have not been acquitted under the state charges so as to make the rulings in *Billings v. Commonwealth*, 223 Ky. 381, 3 S.W. (2) 770, and in *Parrott v. Commonwealth* (Ky.), 287 S.W. (2) 440, applicable. The Kentucky Court of Appeals held in those cases that an acquittal in the state court on the state charge made the evidence produced by a search without a warrant following the arrest inadmissible in another case being prosecuted on a different charge based on what was found in the search.

In the absence of an acquittal under the original state charge the question of the validity of the arrest is an open one for the federal court to decide upon the basis of the evidence presented. Under the circumstances, we think that the ruling of the Kentucky Court of Appeals in *Davis v. Commonwealth*, 280 S.W. (2) 714, is applicable wherein it was held that the legality of an arrest is controlled by Section 36, Kentucky Code of Criminal Practice. Section 36 provides that a peace officer may arrest without a warrant when a public offense is committed in his presence. This has been construed by the Kentucky Court of Appeals to authorize an arrest if the officer acted in good faith and upon reasonable grounds to believe that a public offense was being committed in his presence. *Sizemore v. Hoskins*, 314 Ky. 436, 235 S.W. (2) 1011. The material facts leading up to the arrest were not in dispute. They were summarized by the District Judge in overruling the motion to suppress the evidence, as follow:

"THE COURT: The court is of the opinion that the officers in making this search, acting under instructions from their superior, on the basis of the circumstances surrounding these defendants and their location at that time, 3 o'clock in the morning, in a downtown section, where business houses were located, near a night club, had been there some four or five hours on the street, with these three men loafing about it, without any apparent reason; then when questioned, gave illogical or rather vague and irresponsible and suspicious reasons for why they were there present, and the officers received a call alerting them to these suspicious circumstances—I think they were justified [fol. 599] in making an arrest for vagrancy and they

searched the car as a result of the arrest. Let the motion be overruled."

Under these facts we are of the opinion that the District Judge was not in error in ruling that the arrest was valid and that the search was properly made as an incident of the arrest. Probable cause justifying an arrest or search may exist even though the facts may not be such as to prove guilt beyond a reasonable doubt. *United States v. Nicholson*, F.(2) , C.A. 6th, May 24, 1962.

In addition to the articles found in the automobile, a bartender at the Depot Cafe testified that the three appellants would occasionally be together in the cafe and on one occasion told him while he was serving them drinks at a table that "they had a big job planned." Strunk testified that shortly before the arrest he and Preston were in the back room of the Depot Cafe and Sykes came back there and said, "I have the opportunity to make \$5,000," Preston testified substantially the same, and added that Sykes wanted their opinion as to whether or not he should go through with it, whereupon Strunk said, "Well, if you are going to make \$5,000, you must be going to rob a bank," to which Sykes replied, "Well, how did you know?" Sykes testified that he had been approached by some men to drive a car for them on a bank robbery and that he went to Strunk and Preston and had the conversation above referred to. The appellants claim that they emphatically rejected the suggestion, but the credibility of this part of their testimony was for the jury.

There was also testimony from a resident of the town of Berry, a very small town in Kentucky, that he saw Sykes and a man who resembled Preston on two different occasions on the same day, shortly before their arrest, driving slowly through the town of Berry, looking from side to side and observing things. In a statement made to an agent of the F.B.I. Sykes said that he had intended to rob the bank at Berry, Kentucky, and described to the agent the get-away route he planned to use, and that, in running the get-away route shortly before the arrest, he had stopped at a country store and had a person with him buy two of the caps that were later found in the car. The storekeeper testified that Strunk purchased two caps at his

store on January 18th or 19th, 1961. An F.B.I. agent [fol. 600] testified that Strunk stated to him that he was driving the automobile at the time he stopped at the country store and bought two caps. Preston made a statement to the F.B.I. agent showing how he had procured the automobile through misrepresentations made to the Sixth Street Auto Fill Sales in Newport.

We are of the opinion that with the articles found in the automobile being properly received in evidence, and considering the circumstances under which the appellants were arrested and the testimony hereinabove briefly reviewed, there is no merit in appellants' contention that the District Judge erred in not sustaining their motion for a judgment of acquittal. In considering a motion for judgment of acquittal, the District Judge must take that view of the evidence most favorable to the government, with inferences reasonably and justifiably to be drawn therefrom. If under such a view of the evidence, reasonable minds might differ about the guilt or innocence of a defendant, the motion should be overruled and the issue left to the jury. *United States v. Leggett and Eleveld*, 292 F. (2) 423, 426, C.A. 6th, cert. denied, 368 U.S. 914.

Appellants contend that no offense was committed because the bank was not robbed.⁶ However, it is well settled that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. *Callanan v. United States*, 364 U.S. 587, 593. It logically follows that a conspiracy to commit a crime may be punished even though the crime be not committed. *Goldman v. United States*, 245 U.S. 474, 477; *United States v. Bayer*, 331 U.S. 532, 542; *Frankfeld v. United States*, 198 F. (2) 679, 684, C.A. 4th, cert. denied, 344 U.S. 922, rehearing denied, 345 U.S. 913; *Hanford v. United States*, 231 F. (2) 661, C.A. 4th; *Shibley v. United States*, 237 F. (2) 327, 334-335, C.A. 9th, cert. denied, 352 U.S. 873, rehearing denied, 352 U.S. 919.

Appellants contend that the District Judge erred in permitting government witnesses to testify about statements made to them by the appellant Sykes after the termination of the conspiracy and in the absence of the other appellants. Such statements were admissible only against the person making them. *Anderson v. United States*, 318 U.S. 350;

Mora v. United States, 190 F. (2) 749, C.A. 5th. However, it is well settled that in multidefendant criminal trials, evidence of an incriminating statement or of a confession by one of the defendants is properly admitted if the trial judge makes it unmistakably clear to the jury that such statement or confession is only to be considered against the person making it and should be completely disregarded with respect to any other defendant. *Ward v. United States*, 288 F.(2) 820, 823, C.A. 4th; *Maupin v. United States*, 225 F.(2) 680, C.A. 10th; *United States v. Harris*, 211 F.(2) 656, C.A. 7th; *United States v. Leviton*, 193 F. (2) 848, 856, C.A. 2nd. In our opinion, this requirement was complied with by the District Judge.

In the cross-examination of appellant Sykes he was asked if he had been convicted of a felony. He replied that he had not. The District Attorney then asked him if he had not been convicted in 1956 in Cincinnati, Ohio, of carrying a concealed deadly weapon, to which he answered yes. Defense counsel then moved for mistrial, making the point that carrying a concealed deadly weapon was not a felony under Ohio law until a decision of a Court of Appeals of Ohio in 1960, and that it was prejudicial error to bring to the attention of the jury a prior conviction of a misdemeanor on the part of a defendant. *Henderson v. United States*, 202 F.(2) 400, 405-406, C.A. 6th. The District Judge discussed the question with defense counsel and concluded that he did not know whether Sykes had been convicted of a felony or not and would admonish the jury not to consider the statement. He thereupon carefully instructed the jury that it was not determined whether the offense referred to was or was not a felony under Ohio law, and that the jury should accept Sykes' statement that he had not been convicted of a felony and not to consider the question of the District Attorney, and that the question was entirely without its consideration. We do not consider the question prejudicial under the circumstances. *United States v. On Lee*, 193 F.(2) 306, 310, C.A. 2nd, affirmed, 343 U.S. 747, rehearing denied, 344 U.S. 848; *Dolan v. United States*, 218 F.(2) 454, 459-60, C.A. 8th, cert. denied, 349 U.S. 923.

The judgments are affirmed.

DARR, District Judge, concurring. I concur in the opinion of Judge Miller. However, I believe that an arrest for [fol. 602] vagrancy does not warrant a search extending beyond the person of the vagrant. There would be no reason to search a house or an automobile as an incident to such arrest. An able-bodied person, who is loitering without visible means of support, may be arrested by police officers for vagrancy, his person searched to insure safe custody, but nothing connected with the offense could be found by an extended search.

My judgment is that the offense of vagrancy falls into the same category as minor traffic violations. The rule on incidental search of automobiles in connection with the arrest for minor traffic violations is,

"Where an accused is arrested for a minor traffic violation committed in the presence of an officer, there is no reason for the arresting officer to explore the glove compartment or search the trunk of the car, absent additional cause, and such search is considered unreasonable and any evidence procured thereby, rendered inadmissible." *Varon, Searches, Seizures and Immunities (1961), Vol. 1 pages 107, 108.*

But I believe the search of the car in this case was warranted in that the circumstances, as recited in Judge Miller's opinion, set up probable cause to justify the action of the police officers. One of the purposes for making vagrancy an offense is to prevent crime, as it is considered that criminal action will flow from the mode of life of a vagrant. Therefore, the search by the police officers was reasonable to ascertain whether the automobile carried illegal instrumentalities which might be used in the commission of a crime.

[fol. 603] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 14,670

UNITED STATES OF AMERICA, Plaintiff-Appellee,

vs.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, AND KEN-
NETH RAY STRUNK, Defendants-Appellants.

Before: MILLER, Chief Judge, SIMONS, Senior Circuit
Judge, and DARR, Senior District Judge.

JUDGMENT—Filed July 23, 1962

Appeal from the United States District Court for the
Eastern District of Kentucky.

This Cause came on to be heard on the transcript of the
record from the United States District Court for the East-
ern District of Kentucky, and was submitted on briefs
without oral argument.

On consideration whereof, It is now here ordered and
adjudged by this Court that the judgments of the said
District Court in this cause be and the same are hereby
affirmed.

Approved for entry:

s/ Shackelford Miller, Jr., Chief Judge.

[fol. 604]

[File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

No. 14,670

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

JOHN RICHARD SYKES, JOHN BRENTON PRESTON, AND KENNETH RAY STRUNK, Defendants-Appellants.

Before: MILLER, Chief Judge, SIMONS, Senior Circuit Judge, and DARR, Senior District Judge.

ORDER DENYING PETITION FOR REHEARING—Filed August
31, 1962

The petition for reconsideration filed by the appellant John Brenton Preston is treated as a petition for rehearing, and having been considered by the Court;

It is Ordered that said petition be denied.

Approved for entry:

Shackelford Miller, Jr., Chief Judge, U. S. Court of Appeals for the Sixth Circuit.

[fol. 605] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 606] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1962

No.

JOHN BRENTON PRESTON, Petitioner,

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF
CERTIORARI—October 11, 1962

Upon Consideration of the application of petitioner,
It is Ordered that the time for filing petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including October 30, 1962.

Potter Stewart, Associate Justice of the Supreme
Court of the United Statse.

Dated this 11th day of October, 1962.

[fol. 607] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1962

No. 722 Misc.

JOHN BRENTON PRESTON, Petitioner,

VS.

UNITED STATES

On petition for writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit:

ORDER GRANTING MOTION TO PROCEED IN FORMA PAUPERIS
AND GRANTING PETITION FOR WRIT OF CERTIORARI—May
27, 1963

On consideration of the motion for leave to proceed
herein in forma pauperis and of the petition for writ of
certiorari, it is ordered by this Court that the motion to
proceed in forma pauperis be, and the same is hereby,
granted; and that the petition for writ of certiorari be, and
the same is hereby, granted. The case is transferred to the
appellate docket as No. 1135.

And it is further ordered that the duly certified copy of
the transcript of the proceedings below which accompanied
the petition shall be treated as though filed in response to
such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON,

Petitioner,

—v.—

UNITED STATES,

Respondent.

BRIEF FOR PETITIONER

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(Appointed by this Court)

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JOHN BRENTON PRESTON,

Petitioner,

**— v. —
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Respondent.

BRIEF FOR PETITIONER

Opinions Below

The oral opinion of the trial judge on certain of the issues raised herein appears in the Transcript of Record at pages 26-27 and 170-171. The opinion of the Court of Appeals is reported at 305 F.2d 172.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1962 (R. 309), and a petition for rehearing was denied on August 31, 1962 (R. 310). The petition for writ of certiorari was granted by this Court on May 27, 1963. 373 U.S. 931. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

Questions Presented

1. Whether, under the Fourth Amendment to the United States Constitution, certain evidence that was seized by state officers after a search, without a warrant, of a car in which petitioner was located at the time of his arrest should have been excluded in the subsequent federal criminal proceeding against him. The subordinate questions are:

a. Whether the arrest without a warrant was invalid either because the crime of vagrancy was not committed in the officers' presence, or because the officers did not have probable cause, or because the vagrancy statute under which the arrest was made is unconstitutional, and

b. Whether the search and seizure were incident to the arrest.

2. Whether, under the Sixth Amendment to the United States Constitution, petitioner was deprived of the effective assistance of counsel by the appointment of two counsel to represent him and two co-defendants jointly.

Constitutional Provisions Involved

The Fourth Amendment to the Constitution of the United States provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Statutory Provisions Involved

Section 436.520, Kentucky Revised Statutes, provides:

"(1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

"(2) 'Vagrant' as used in subsection (1) of this section and KRS 436.530 means:

"(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

"(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

"(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

"(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city."

Section 436.530, Kentucky Revised Statutes, provides:

"All peace officers shall keep a watch for vagrants at places where they are accustomed to congregate. If any of these officers has reason to believe that a vagrant habitually infests a public place or street, he shall warn the vagrant to leave that place and go to work. If two or more vagrants habitually loiter about any street or public place, the officer shall disperse them, using no more force than is reasonably necessary for that purpose."

Section 204.060, Kentucky Revised Statutes, provides:

"Every person going about begging, or staying in any street or other place to beg, shall, on the warrant of the county judge, be sent to and kept at the poor-house. If such person is a male, and able to work, he may be proceeded against under the vagrant laws."

Section 36 of the Kentucky Criminal Code provides:

"A peace officer may make an arrest—

"1. *In obedience to warrant.* In obedience to a warrant of arrest delivered to him.

"2. *Without a warrant; when.* Without a warrant, when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony."

Statement

Petitioner, together with three other persons, was indicted on a charge of conspiring to rob a federally insured bank in Berry, Kentucky, a violation of 18 U.S.C. 2113 (R. 1). He and two co-defendants were tried together and convicted, the fourth person apparently having eluded arrest. The principal issue on this review is whether certain evidence admitted at the trial was obtained by an unconstitutional search and seizure.¹

Prior to trial, defendants' court-appointed counsel² moved to suppress as evidence a number of articles that had been taken by the police from an automobile owned by one of the defendants (R. 2-3). After a pre-trial hearing, this motion was denied (R. 26). It was unsuccessfully renewed both at the conclusion of the Government's case and at the conclusion of the trial (R. 168, 253-254).

For purposes of this review, the circumstances relevant to the search and seizure issue are established principally through the testimony of the police officers who arrested defendants and conducted the search and seizure. Although some of that testimony was controverted at the trial by the defendants, and although the trial judge made no findings of fact, we assume that he resolved conflicts in testimony against the defendants. In addition to the testimony of the officers, however, certain testimony of the defendants that was not controverted by the government may be relevant, although it was not so regarded by the Court of Appeals or the trial judge.

¹ We discuss in addition an issue, deprivation of effective assistance of counsel, which was not raised in the courts below but which this Court may wish to consider. See *infra*, pp. 54-57.

² Two attorneys were appointed to represent all three defendants jointly (R. 5).

The testimony of the officers, which was substantially the same at the pre-trial hearing and at the trial,³ established the following facts:

On January 20, 1961, in the city of Newport, Kentucky, two local patrolmen in one police cruiser and two detectives in another received radio calls shortly before 3 a.m. instructing them to drive to a certain address to investigate the occupants of a parked car (R. 7, 9, 11, 12, 14, 17, 19, 34, 40). This order was prompted by a phone call from a person whose name was not given to the officers or, for all that appears, to the person at headquarters who received the call (R. 12, 18, 40). The substance of the call, as it was relayed to the officers making the investigation, was that the car had been parked at the same place, apparently with the men in it, for about five hours, and that the men were "acting suspicious" in that, as the only officer who testified with more particularity put it: "[T]hey just set around, one of them got out of the car and left and then came back. That was all" (R. 9, 12, 14, 18, 19, 40).

So far as appears, none of the officers had known any of the men before, so that the telephone call was the only information they had when they arrived at the parked car.⁴

The location where the car was parked was in the business district of the city (R. 11, 18). Nearby was a night club which apparently closed at 3 a.m., the marquee of which was still lit (R. 13, 18, 37, 56). It was not unusual for cars to be parked in that area at that time of the morning, and

³ Two of the officers (Ciafardini and Dotson) testified both at the hearing and at the trial; one (Quitter) testified only at the trial; and the other (Colston) testified only at the hearing. There was no material discrepancy in testimony among these witnesses.

⁴ Two of the officers testified they had not seen any of the men before (R. 11, 60), and the other officers neither stated nor implied that they had.

other cars in fact were there; but there were no other people in the vicinity and "there wasn't too much traffic" (R. 37, 56-57).

When the officers arrived, they questioned the men in the car, who were petitioner and his two co-defendants, John Sykes and Kenneth Strunk. The questioning disclosed that all of them had lived in the area for some time, that they were unemployed, and that Strunk had been out of work for six months; though he had worked previously (R. 9, 11, 17, 35, 42, 58). Sykes said that he had purchased the car the day before, but he did not have the title documents with him (R. 17, 22, 41, 59, 65). (His statement was, however, true (R. 59, 117, 118).) Among the three, they had only 25 cents with them (R. 9, 22, 35, 41).

In response to questions about what they were doing at that location at that time of morning, the men gave answers that the officers considered "evasive." They stated that they were waiting for a truck driver named Sexton who was to stop in Newport; but they could not give the name of the company for which he worked, they could not describe the truck, they did not know what time he would arrive, and they could not explain to the officers' satisfaction why they were parked a block away from the establishment where they said Sexton usually stopped for a cup of coffee (R. 9, 14-15; 16, 22, 35, 41).

The officers asked whether any of them had been arrested, and Sykes admitted that he had been arrested once for breaking and entering (R. 42).

On the basis of this evidence, the officer's arrested the men for vagrancy. More particularly, detective Ciafardini said that they had "vaggged" the men because of their evasive answers, and that the men's behavior had aroused his

suspicion that they "[w]ere up for no good." Officer Dotson also stressed the unsatisfactory responses of the men and agreed that their being parked for five hours until 3 a.m. was "suspicious" (R. 21-22). Detective Quitter,

⁵ He stated:

"... When we were questioning them, their answers were evasive. They couldn't give us the right answers. They didn't know the make of the truck that was coming in and what time this fellow Sexton was supposed to come in and we asked them about—'Well, how do you know, how are you going to see the guy?' They said, 'Well, he usually stops down at one of the restaurants a square below.' ...

"Q. Did you ask them what they were doing that far away if the fellow was supposed to stop at the other location?

"A. Yes, sir.

"Q. Did they give you any answer?

"A. Evasive again. That is why we 'vagged' them.

"Q. Did they have any funds on their person?

"A. Twenty-five cents between the three.

"Q. Did you question them as to employment?

• • • • •

"A. Strunk said he hadn't worked for six months and the other two said they hadn't been working.

"Q. Did anybody tell you who owned the automobile?

"A. Sykes said that he had purchased the automobile that day or the day before, but he had no papers to show that the automobile was owned by him.

• • • • •

"Q. Did their answers or demeanor at the time you questioned them arouse your suspicions?

"A. Yes, sir.

"Q. Your suspicions for what? What kind of suspicions?

"A. Were up for no good" (R. 16, 17, 18).

⁶ He testified in part as follows:

"Q. ... [D]id they arouse your suspicions in any manner?

"A. Yes, sir. They were parked there at that hour of the morning was suspicious, yes, sir, and we received a call on the complaint ... [T]hey had been there since 10 p.m.

• • • • •

"Q. Did they give any logical excuse for being in that area at that time of the morning?

"A. Yes, sir. They said they were waiting for a truck to come through; they were out of a job and they said they were

while mentioning both the information concerning unemployment and the vagueness of the men's responses as bases for the arrest, testified that the men "look[ed] suspicious" to him. Only officer Colston appeared to place primary

waiting for a truck and we asked them the identity of the truck, which they couldn't give us the identity of the truck, and we asked them who the man was they were supposed to meet and they couldn't—they just said they was supposed to meet a man coming through there on a semi-truck, was supposed to meet them down at the restaurant down at the next corner and they didn't have no money on them—I think a quarter is all one of them had or something like that.

"Q. Did they have any papers to show that any one of them owned the automobile?

"A. No, sir" (R. 21-22).

"He stated:

"... The three men ... were in the car and we asked them what they were doing here, they were very vague as to why they were there and eventually one of them stated this, that they were waiting for a man who was driving a truck by the name of Johnny Sexton. We asked him who this Johnny Sexton worked for and they didn't know that; what kind of truck he drove, they didn't know that; and we asked them about the ownership of the car. Sykes said he owned the car. When we asked him when he had bought it, he said the day before and we said, 'Well, how would Johnny Sexton know you, he doesn't know the car?' And he stated, 'Well, he usually goes down at the next corner and stops in for a cup of coffee.' So we said, 'Well, why didn't you park down there?' Well, he couldn't give any explanation of that. We asked him about working. Neither one had a job. One of them I think stated that he hadn't worked for about six months. So we placed a charge of vagrancy on them.

"Q. Do you know how much money they had on their possession at the time they were searched.

"A. A quarter between them.

"Q. [on cross-examination] And were they—did they look suspicious to you?

"A. Well, I would say with the call that we received, yes" (R. 35, 38).

stress upon the fact that the men were unemployed, although he too testified as to the inability of the men to provide any details as to the person whom they said they were to meet."

After the arrest, the men were searched for weapons and taken to police headquarters (R. 10, 42, 13, 15, 20, 35). After being booked on the vagrancy charged, they were searched again and the officers "started to interrogate them" (R. 42, 35, 64). The search of Preston revealed a piece of twine in his hip pocket (R. 17, 42). Also, the police discovered that he had an artificial leg, which he removed upon their request and which contained two band-aids and a safety razor (R. 37, 43).

Sykes' car, which had not been searched at the time of the arrest, had been driven by one of the officers to the police station, which was about eight blocks from the place of arrest, and thereafter had been towed to a garage an unspecified distance from the station (R. 10, 12, 13, 62).

• He testified:

"Q. Can you tell the Court why you arrested these men for vagrancy?

"A. Well, in the investigation, talking to them, none of them were employed and they were in the vicinity for some time. Some of them hadn't been employed for six months, one or two of them, so we arrested them for vagrancy.

"Q. Did they have any money on them?

"A. I think some small change is all.

• • • • •

"Q. Did they give you any excuse as to why they were there on the street at that hour of the morning?

"A. They told us they was waiting for a truckdriver, a man who was driving a truck, from Lexington going to Newport.

"Q. Did they tell you what trucking company?

"A. They didn't know what trucking company.

"Q. Did they know what time he would be through?

"A. No. They didn't know what time he would be through.

"Q. Did they know what route he would be taking?

"A. They said he would come through Newport on 27, that is all they knew" (R. 9-10).

At some point shortly after the booking and the search of the men at the station, Sykes asked for permission to go to the car to get some cigarettes. Permission was refused, but "a little while later" three of the officers secured the keys from the lieutenant who had taken custody of defendants' effects and "went down to search the car" (R. 36, 8, 10, 15, 23, 24, 43).^{*} The record is not explicit as to whether their purpose was to examine the car generally or simply to look for cigarettes, nor does it appear whether the officers told the defendants they were going to search the car. But at any rate there is nothing to indicate that the officers either sought or received consent even to look for cigarettes.

The officers found no cigarettes in the car, but in looking in the glove compartment they discovered two loaded revolvers (R. 15, 21, 23, 43, 60-61). They then tried to open the trunk with the keys, but without success (R. 15, 24, 44). Thereupon, they took the guns back to the station (R. 15), where detective Ciafardini had Sykes brought out again for questioning, "pushed him in a chair and . . . said, 'We have got some talking to do'" (R. 43-44, 61). In the meantime, Ciafardini asked officer Dotson to go back and try to get into the trunk (R. 15, 44, 61).

Dotson, assisted by a man who was apparently an employee of the garage to which the car had been towed, pulled

^{*} It is not clear whether one of the three, Dotson, actually participated in the search or was simply standing in the vicinity of the car (R. 8, 60-61, 65, 66).

One of the officers implied that the keys had been secured by a search of Sykes (R. 24; see also R. 42). However, if this was so it is not apparent how an officer could have driven the car to the station, unless perhaps the keys were seized when Sykes was searched for weapons at the place of arrest (or unless Sykes was telling the truth when he testified that the car was of the type that can be started without keys (see *infra*, p. 13)). It is also unclear why the car was towed to the garage after having been driven to the station. None of these ambiguities, however, are material.

out the back seat, pushed aside the partition, and crawled into the trunk (R. 15, 62, 64-65, 21, 44). In the trunk, he discovered the articles that, in addition to the guns, are here in question—four caps; two women's stockings, one with eye holes cut into it; five band-aids; one pair of leather gloves; one pair of work gloves; one sock; two pieces of rope; a length of fishing cord; two pillow slips; two shotgun shells; and a 1961 Kentucky license plate with hooks attached to it which could be used to attach it to another plate (R. 20, 23, 36, 37, 44-47).

Although it would seem that the sequence of events described above after the arrest and prior to the search—the trip eight blocks to the station, the towing of the car from the station to the garage, the booking and the search of defendants, and some interrogation—would have taken some considerable time, the three witnesses who testified as to the time lapse between arrest and search agreed that the second search of the auto took place within 15 to 30 minutes after arrest (R. 8, 70, 233). One of these witnesses, moreover, was petitioner:

After the guns were found in the glove compartment, but precisely when is unclear, charges of carrying concealed and deadly weapons were placed against the defendants (R. 16, 17, 24, 52).

The sequence of events leading to the institution of the federal charge against the defendants does not appear in detail in the record. After the searches were completed, however, Sykes confessed to the local police that he and two others—but not petitioner or Strunk—intended to rob a bank in Barry, Kentucky, a town located about 51 miles from Newport (R. 62, 151). Apparently this led the police to call federal agents into the investigation, inasmuch as agents of the Federal Bureau of Investigation interrogated Sykes later on the day of the arrest (R. 138). The articles

that had been seized were turned over to the Bureau agents the next day (R. 16, 44). The charges of vagrancy and carrying a concealed and deadly weapon were never brought to trial, but rather were, as the clerk of the police court put it, "adopted" by the federal government (R. 25).

The testimony of the petitioner and his co-defendants, insofar as it related to the arrest and search, was in part in conflict with the testimony of the officers. Thus, for example, Sykes stated that they had been parked for only 2½ hours rather than 5 hours; that the glove compartment had been locked and that he had had no keys with him (the car being of the type that did not require a key if the switch was placed in a certain position); that he had not asked for cigarettes; and that detective Ciafardini knew him and realized that he was not a vagrant, but also knew that he carried a gun and vowed that he would find it if it was in the car. He also testified that he was waiting for his wife's ex-husband to come out of the night club so that he could "whip him" for not paying support money, and he suggested that the persons in the club that had been watching him in the car might have phoned the police (R. 184-186). Petitioner, on the other hand, said that so far as he had been aware the only purpose they had in parking was to wait for a friend of Sykes who might be able to get them a job (R. 225).

As to such testimony, as we have noted, presumably the conflicts were resolved against the petitioner and his co-defendants by the trial judge. However, the defendants did provide facts concerning their economic condition that were not disputed and that their counsel contended were relevant to the arrests for vagrancy, and this testimony was not controverted. Thus Sykes stated that he was married and had four children; that he had been a salesman for a heating concern, from which he had been released less than two

months before the arrest; that he had drawn unemployment compensation from that time until his arrest; that he had looked for a job each day during that period of unemployment; and that he had attempted to earn money by selling cars for a used car dealer (R. 178-180).

Strunk testified that he had lived in Newport for about two years, and in the Cincinnati-Newport area for about 14 years altogether; that he was married and had two children; that he was a furnace mechanic by trade; that he had been laid off from his job over nine months before his arrest; that he had looked for a job without success; that he had drawn unemployment compensation until slightly less than two months prior to his arrest; that he had been able to do some "odd jobs" for his aunts; and that, after his unemployment compensation ran out, his mother had helped him financially (R. 199-200, 213).¹⁰

Petitioner testified that he had spent most of his life in Kentucky; that he was married and had two children, and that his wife was pregnant and living with her mother; that he had worked as a construction laborer and a musician; that he was employed during the first part of January, 1961, as a bartender; and that on January 7th he was stabbed in a fight and was incapacitated so that he could not work (R. 218-221). The woman in whose house petitioner stayed after his injury (the mother of a friend of petitioner's) verified his testimony as to his physical condition, and one of the FBI agents mentioned that petitioner had "somewhat of a bad cut on one of his fingers" (R. 163, 241).

Both the trial judge (R. 26, 168) and the Court of Appeals regarded the search and seizure as valid because

¹⁰ A minor discrepancy appears here in that the officers testified that Strunk had said he had been unemployed for 6 months rather than 9 months.

incident to a valid arrest. 305 F.2d 172. The Court of Appeals explicitly, and the trial judge implicitly, concluded that the arrest was valid whether or not the crime of vagrancy had actually been committed, as long as the officers had reasonable cause to believe it had been committed. *Id.*, at 175. On this theory, the testimony of the defendants as to their economic status was not material.

As to probable cause for the arrest, the Court of Appeals relied principally upon the statement of the trial judge made when he overruled the motion prior to trial, *id.*, at 175, which was shorter but similar in substance to the statement he made at the close of the government's case, when he said in part:

"... These men had been parked from 8 or 9 o'clock until 3 o'clock in a business section with apparently no purchase [sic], no reason And you or anybody else would place yourself under suspicion. If the police department weren't suspicious of that kind of conduct, you ought to get another police department. You can't wait until a robbery or something occurs and then say, 'We didn't know anything about it.' They had been parked there five hours. They had gotten in and out of that car. At least they had gotten telephone calls—the police station—that these men were acting suspicious. They were afraid of them. (Why shouldn't they be? You would be, I would be—parked right there on the side of the street there in the business section of the town, where there were jewelry stores and banks within a reasonable distance, some of the officers went there and questioned them and the more they questioned them the more suspicious they acted; they told them things that weren't true . . . so they said, 'Come with me,' and they took them into custody for vagrancy—they gave no reasonable explanation . . . (R. 170-171)."

Neither the trial judge nor the Court of Appeals elaborated upon why, assuming the arrest was valid, the search was incident to the arrest. The concurring judge in the Court of Appeals, however, stated that, in his view,

"... an arrest for vagrancy does not warrant a search extending beyond the person of the vagrant. There would be no reason to search a house or an automobile as an incident to such arrest. An able-bodied person, who is loitering without visible means of support, may be arrested by police officers for vagrancy, his person searched to insure safe custody, but nothing connected with the offense could be found by an extended search." 305 F.2d, at 177.

Inexplicably, however, he concluded:

"But I believe the search of the car in this case was warranted in that the circumstances... set up probable cause to justify the action of the police officers. One of the purposes for making vagrancy an offense is to prevent crime, as it is considered that criminal action will flow from the mode of life of a vagrant. Therefore, the search... was reasonable to ascertain whether the automobile carried illegal instrumentalities which might be used in the commission of a crime."
Ibid.

Those are the facts relevant to the search and seizure issue. It may not be amiss, however, to note that the introduction of the articles seized from the auto must have had a considerable impact on the jury. Indeed, there would hardly have been any case at all against petitioner absent this evidence.

The trial was a rather lengthy one, and the government attempted to establish a conspiracy and to link petitioner

to it by various pieces of circumstantial evidence. Excluding that evidence which seems so remote as not to be worth mentioning, the evidence against petitioner, in addition to the articles seized from the trunk, was as follows:

First, a bartender testified that, some time after January 1, 1961, while the three defendants and two girls were in a cafe in which he worked, one of them (he could not recall which) told him that "they had a big job planned and never said what it was or anything else" (R. 71-77). In response to the question whether a "big job" might have been something like the installation of a furnace, he conceded that "[i]t could have been anything" (R. 77).¹¹

Next, a storekeeper in Berry testified that in early January he had seen Sykes and another person whom he could "fairly well identify" as Preston driving slowly through Berry twice on the same day (R. 79-85). And the cashier of the Berry bank stated that he doubted that any other establishment in Berry would have much money on-hand (R. 91).

Finally, an FBI agent testified that petitioner had admitted to him that he had discussed robbing the Berry bank with Sykes and Strunk, but had claimed that this discussion "was in the preliminary stages" (R. 163). (Petitioner denied having said anything to the agent about the Berry bank, and his explanation of what he meant by "preliminary stages" was that Sykes had said he had a chance to make \$5,000, and that when he admitted that it was by way of robbing a bank, Strunk stated he didn't even want to hear any more about it (R. 202-203).)

We think it fair to say that, apart from the articles seized, it was only the FBI agent's testimony that even

¹¹ The court was of the view that this person was "very obviously an unwilling witness" (R. 78).

arguably was sufficient to carry the case against petitioner to the jury both on the question of conspiracy and on the question whether the object of the conspiracy was the bank at Berry. And, it may be added, even if the seized articles be considered, the evidence was still minimal.¹²

These, then, are the relevant facts, as we see the case. On the basis of a *pro se* petition, this Court granted the motion to proceed *in forma pauperis*; granted the petition for *certiorari*, and appointed counsel. 373 U.S. 931.

Summary of Argument

1. Since *Elkins v. United States*, 364 U.S. 206 (1960), if a search or seizure by state officers violated Fourth Amendment standards, the articles seized are not admissible in a federal proceeding.

2. The search and seizure in this case were invalid because the arrest was invalid.

a. The Court of Appeals was incorrect in holding that, under section 36 of the Kentucky Criminal Code governing arrests without warrants, the phrase "when a public offense is committed in [the officer's] presence" merely requires that he have had probable cause to believe the offense was being committed. While the probable cause test has been applied by the Kentucky Court of Appeals in false arrest

¹² It perhaps should be noted specifically that Sykes' oral confessions to the police and to the FBI agents, one version of which implicated petitioner, were not admissible against Preston, as the trial judge correctly instructed the jury (R/ 63, 144, 147-148, 157, 288). Sykes repudiated these confessions when he testified at the trial, claiming that they had been coerced (R. 186-189).

It may also be noted that there is no basis in the record for any inference that the defendants were about to commit the robbery when they were arrested. As indicated above, the bank was located some 54 miles from the place of arrest.

damage actions against officers, see cases cited *infra*, p. 26, these decisions were placed upon a separate drunkenness and disorderly conduct statute, not upon section 36. In cases where the issue is the legality of a search and seizure incident to an arrest, the Kentucky Court of Appeals has considered the test to be whether the offense actually had been committed in the officer's presence, see cases cited *infra*, p. 27; and the court has explicitly recognized the difference in approach between the two types of cases. *L. & N.R. Co. v. Creech*, 218 Ky. 147, 151, 271 S.W. 674 (1927).

And if the question is whether the offense of vagrancy was actually committed, the record establishes that it was not. The testimony of the defendants was undisputed that they all had families, that they all had trades, and that, while they were temporarily out of work, they all had tried to secure employment.

b. Moreover, the officers arrested on a ground not related to the Kentucky vagrancy statute. That statute is not of the type that is designed to permit officers to arrest persons who are abroad at late hours in suspicious circumstances and who fail to make a reasonable explanation. Rather, the Kentucky legislation is basically a "poor law," defining as vagrants those who refuse to work and who loiter about the town. See statute, *supra* p. 3. In this case, however, the officers arrested—and the courts justified the arrests—because they were suspicious of the petitioner and the co-defendants, not because the officers thought they were vagrants within the meaning of the statute. Consequently, the arrest was invalid.

c. Even assuming the officers arrested because of a belief that the individuals had violated the vagrancy statute, and assuming also that the Court of Appeals was correct in viewing the state law test to be whether there was probable cause to believe the defendants were vagrants rather than

whether they actually were, there was still insufficient basis for the arrest. The question as to probable cause is whether the officers could have obtained a warrant, *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). The only facts the officers could have presented to a magistrate were that the men were unemployed, that one had been unemployed for six months, that they had only 25 cents among them in the car, and that they had been parked for about five hours. This was insufficient to establish probable cause that the men had "habitually fail[ed] to engage in honest labor," or had "habitually refuse[d] to work," or had "habitually loiter[ed] or ramble[d] about," within the meaning of the statute. Apart from any other consideration, the word "habitually" makes explicit what has been the general view of the courts, i.e., that in a vagrancy prosecution a pattern of action must be established. Here there was no probable cause to conclude that there had been such a pattern of action.

d. The arrest was invalid also because the vagrancy statute is so vague as to be unconstitutional under the Fourteenth Amendment. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), where the Court struck down a state law declaring it a crime to be a "gangster." Such phrases as "habitually loiters or rambles about," "visible means of support," and "idle and dissolute," are "terms so vague that men of common intelligence must necessarily guess at [their] meaning and differ as to [their] application." *Id.*, at 453.

Moreover, inasmuch as the statute, in effect, makes it a crime simply to acquire willingly the status of a pauper apart from any anti-social acts, the law runs afoul of the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment. Cf. *Robinson v. California*, 370 U.S. 660 (1962).

3. Assuming the arrest was valid, the search and seizure were nonetheless invalid.

a. The doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), permitting a search of automobiles without a warrant even prior to arrest in appropriate circumstances, is inapplicable, because here the officers had no probable cause to believe that property subject to seizure was in the car, and also because it cannot be said that "it was not practicable to secure a warrant because the vehicle [could] be quickly moved out of the locality or jurisdiction . . ." *Id.*, at 153.

b. Where the arrest is for vagrancy, the search incident to arrest doctrine should not be applied so as to justify a search beyond that necessary to protect the officers and to prevent escape. The additional basis for such a search that has been recognized by this Court, i.e., to search "in order to find and seize things connected with the crime as its fruits or as the means by which it was committed," *Agnello v. United States*, 269 U.S. 20, 30 (1925), is obviously not relevant where the crime charged is vagrancy. Cf. decisions barring searches of automobiles in connection with arrests for minor traffic violations, e.g., *People v. Mayo*, 19 Ill. 2d 136, 166 N.E. 2d 440 (1960).

c. Assuming that a broader search may be made incident to an arrest for vagrancy, the search and seizure in this case were nonetheless invalid.

First, the search and seizure were not contemporaneous with the arrest nor did they occur at the same place as the arrest, and consequently they were invalid under the principle announced in *Agnello v. United States*, 269 U.S. 20 (1925).

Second, there was ample opportunity to secure a warrant; and even under *United States v. Robinowitz*, 339 U.S.

56 (1950), this is still a relevant consideration. Indeed, where both the car and the persons who were in it were in the custody of the police, so that it is indisputable that the police could readily have sought a warrant, we submit that the failure to do so should be controlling. See *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960); *Shurman v. United States*, 219 F.2d 282 (5th Cir. 1955).

Finally, the crime of vagrancy was in fact not committed, as the record establishes; and the Court has consistently regarded the question whether the crime was committed in the presence of the arresting officers as relevant to the validity of an incidental search. *E.g., Harris v. United States*, 331 U.S. 145, 155 (1947); *United States v. Rabino-witz*, 339 U.S. 56, 64; *Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1931).

4. Petitioner was deprived of his right under the Sixth Amendment to effective assistance of counsel by virtue of the appointment of two attorneys to represent him and his two co-defendants jointly. *Glasser v. United States*, 315 U.S. 60 (1942). The interests of the defendants were not identical. Sykes had confessed and the articles introduced into evidence were found in his car. But counsel could not freely attempt to disassociate petitioner from Sykes because of their obligation to Sykes. While this issue has not been raised until now, this failure cannot be assigned to petitioner. Moreover, the error is plain; and, in the circumstances of this case where the evidence against petitioner was flimsy, it has a direct bearing upon the correctness of the jury verdict. Consequently, we urge the Court to consider the question if failure to do so would result in affirmance of the judgment.

ARGUMENT

I.

Introduction.

Since the demise of the "silver platter" doctrine, the fact that a search and seizure are made by local officers without participation by federal officers no longer forecloses inquiry into the reasonableness of the search and seizure when the articles seized are proffered as evidence in a Federal prosecution. Rather, the question of admissibility turns solely upon whether the search and seizure, "if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment. . . ." *Elkins v. United States*, 364 U.S. 206, 223 (1960).¹³

In the case at bar, consequently, the correctness of the judgment under review must be measured by those decisions of this Court bearing upon the right of officers under the Fourth Amendment to search without a warrant incident to arrest. Among those decisions, we take it as undisputed that *Harris v. United States*, 331 U.S. 145 (1947), and *United States v. Rabinowitz*, 339 U.S. 56 (1950), accord the most latitude to the police. See, e.g., *Abel v. United States*, 362 U.S. 217, 235 (1960). But while, as this Court has observed, "[T]here are those [citing the *Harris* and *Rabinowitz* dissents] who think that some of the Court's decisions have tipped the balance too heavily against the protection of that individual privacy which it was the purpose of the Fourth Amendment to guarantee," *Elkins v. United States*, *supra*, at 222, and while there appears to be some basis for infer-

¹³ No doubt the subsequent decisions in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Ker v. California*, 374 U.S. 23 (1963), require the same approach.

ring from several of this Court's opinions that *Harris* and *Rabinowitz* may stand on rather shaky ground, see *Abel v. United States*, *supra*, at 235, 248-249; *Wong Sun v. United States*, 371 U.S. 471, 480 n. 8 (1963); *Ker v. California*, 374 U.S. 23, 41-42 (1963); *Chapman v. United States*, 365 U.S. 610, 618 (concurring opinion), 623 (dissenting opinion) (1961), the case at bar can be disposed of without reexamination of *Harris* and *Rabinowitz*. That is, the search and seizure here involved violated the standards of the Fourth Amendment because, in the first place, the arrest was invalid, and, in the second place, the search was not sufficiently related to the arrest even under the *Harris-Rabinowitz* approach to be considered incident to the arrest.¹⁴

II.

The Search and Seizure Were Invalid Because the Arrest Was Invalid.

It is firmly established, of course, that a search and seizure without a warrant cannot be justified on the basis of a contemporaneous arrest unless the arrest was valid. *E.g.*, *Henry v. United States*, 361 U.S. 98 (1959); *Draper v. United States*, 358 U.S. 307 (1959). In the case at bar, the arrest was invalid principally because (1) it was not based upon probable cause to believe the defendants had committed the crime of vagrancy, and (2) the vagrancy statute upon which the arrest was grounded is unconstitutional.

A. THE OFFICERS DID NOT HAVE PROBABLE CAUSE TO ARREST.

The infirmity of the arrest in this case has a double aspect. Not only did the officers lack probable cause to believe the

¹⁴ As a preliminary matter, it may be noted that, under the principle established in *Jones v. United States*, 362 U.S. 257 (1960), there is no problem of standing in this case; and the government has not at any point contended otherwise.

offense of vagrancy, as defined by the Kentucky statute, was being committed, but they arrested on grounds that are not covered by that statute.

1. *The officers' authority to arrest without a warrant.* At the time of the arrest, a peace officer in Kentucky was empowered to arrest without a warrant "when a public offense [was] committed in his presence, or when he [had] reasonable grounds for believing that the person arrested [had] committed a felony." Ky. Crim. Code, § 36.¹⁵

Thus, assuming that vagrancy—which, of course, is not a felony—is a "public offense" within the meaning of this statute,¹⁶ it would seem from the statutory language that

¹⁵ Since that time, the Kentucky Criminal Code has been repealed. The statutory provision substituted for section 36 authorizes an officer to arrest without a warrant "when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony." Ky. Rev. Stats., § 431.005 (Ky. Acts 1962, c. 234, § 31, effective January 1, 1963).

Presumably this revision was designed to permit arrests where misdemeanors not amounting to breaches of the peace are committed in the presence of the officers. See, e.g., *Lewis v. Commonwealth*, 197 Ky. 449, 247 S.W. 749 (1923), where the Kentucky Court of Appeals appears to have construed the "public offense" phrase in section 36 as requiring an act in the nature of a breach of the peace.

¹⁶ This may well be doubtful. While we have found no Kentucky decisions directly in point, in *Lewis v. Commonwealth*, 197 Ky. 449, 247 S.W. 749 (1923), the Kentucky Court of Appeals held that a search incident to an arrest in a hotel room for drunkenness was illegal because such drunkenness was not a "public offense," the implication being that in some material way the offense must overtly disturb the public order in order for an officer to arrest without a warrant. Vagrancy, as defined by the Kentucky statute (*infra*, pp. 29-30) and as measured by the actions of the defendants in this case, hardly qualifies under such a standard. On the other hand, it appears that the majority view at common law was that an arrest without a warrant could be made for vagrancy; and the common law rule, of course, prohibited such arrests in the case of misdemeanors not amounting to breaches of the peace. See *Wilgus, Arrest Without A Warrant*, 22 Mich. 673, 674, 703, 704-705 (1924), and cases there cited.

the crime would actually have to be committed in the officer's presence in order to justify an arrest without a warrant, rather than that the officer could arrest simply upon probable cause to believe that the crime was being committed. However, the Court of Appeals in this case held to the contrary, relying upon *Sizemore v. Hoskins*, 314 Ky. 436, 235 S.W.2d 1011 (1951). There, in a damage action against an arresting officer, the court held that there could be no recovery if the officer had had reasonable cause for believing the person arrested to be drunk, even though in fact he had not been.

The lower court's view of the Kentucky law does not appear to be accurate. In the first place, the *Sizemore* rule, which has been followed by the Kentucky Court of Appeals in a number of other damage actions, seems to have been based upon the wording of a separate drunkenness and disorderly conduct arrest statute rather than upon section 36. See *Easton v. Commonwealth*, 26 Ky. L.Rep. 960, 82 S.W. 996 (1904); *Weaver v. McGovern*, 122 Ky. 1, 90 S.W. 984 (1906); *L. & N.R. Co. v. Creech*, 218 Ky. 147, 271 S.W. 674 (1927); *Commonwealth v. Reed*, 208 Ky. 587, 271 S.W. 674 (1925); *Goins v. Hudson*, 246 Ky. 517, 55 S.W.2d 388 (1932). As the court said in *Easton* in disapproving instructions that required a finding of actual commission of the crime rather than mere probable cause, "The instructions of the court correctly state the rule as to arrests for ordinary offenses, but drunkenness and disorderly conduct are placed by the statute on a peculiar ground." 82 S.W. at 997.

In any event, it would hardly seem inevitable that the Kentucky courts would apply the same rule to search and seizure questions as they apply in damage actions. And, as a matter of fact, it seems that they do not. Rather, where the issue is the validity of a search incident to an arrest for a misdemeanor, the Kentucky courts seem to judge the

validity of the arrest only by whether the offense had been committed in the officer's presence. See, e.g., *Spires v. Commonwealth*, 207 Ky. 460, 269 S.W. 532 (1925); *Ingle v. Commonwealth*, 204 Ky. 518, 264 S.W. 1088 (1924); *Elswick v. Commonwealth*, 202 Ky. 703, 261 S.W. 249 (1924). In *L. & N.R. Co. v. Creech*, *supra*, the Kentucky Court of Appeals specifically noted this difference in approach when it stated:

"True, in cases where there is an objection to the admissibility of evidence procured by an illegal arrest and subsequent seizure, the code provisions authorizing arrests without a warrant have been construed with more particularity and perhaps with less liberality in upholding the legality of such arrests. . . ." 218 Ky., at 151.

And *cf.* *Taylor v. Commonwealth*, 274 Ky. 702, 713, 120 S.W.2d 228 (1938), where, in a murder prosecution against an arresting officer, the court required that a finding be made that the offense had actually been committed by the person who was killed by the officer during an attempt to arrest. See also *Stevens v. Commonwealth*, 124 Ky. 32, 98 S.W. 284 (1906).

If the question, then, be whether the defendants were actually committing the crime of vagrancy when arrested, plainly this arrest was invalid, for, as we demonstrate in connection with an issue discussed in a later portion of the brief, *infra*, pp. 53-54, there is no basis in this record for concluding that the defendants were actually vagrants.

However, we assume that the Court did not grant *certiorari* primarily to consider local law questions of this sort, as to which it would normally give considerable weight to the decision of the Court of Appeals. See, e.g., *United States v. Durham Lumber Co.*, 363 U.S. 522, 526-527 (1960). Consequently, having made our point as to the grave doubt

about this aspect of the lower court decision, we pass on to the more significant problems in the case.

Accepting *arguendo* the correctness of the lower court's view as to the Kentucky law of arrest without a warrant, then, the question is whether the officers had probable cause to believe the petitioner and his co-defendants were committing the crime of vagrancy at the time of arrest.

2. *The Kentucky vagrancy statute.* Vagrancy statutes in this country are, of course, of many different types. It is generally agreed that common to all is the fact that they make a person's status, rather than his actions, the crime; and in this respect the Kentucky statute falls into the general pattern.¹⁷ However, the statute differs in one critically important respect from vagrancy statutes in some other states—it is not designed to forestall crime by apprehending the criminal before he has the chance to commit the crime. Rather, it is essentially a "poor law" with the same primary theoretical basis as the first English vagrancy legislation, i.e., that a person's economic behavior can be so anti-social that criminal sanctions may be brought into play.¹⁸

¹⁷ See the following commentaries and the cases cited therein: Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 6-7 (1960); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 Harv. L.Rev. 1203 (1953); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 114-116 (1962); Comment, *Who Is a Vagrant in California*, 23 Cal. L.Rev. 506, 514-518 (1935); Clark & Marshall, *Crimes* §4.00, at 181 (6th ed. 1958); 3 Wharton, *Criminal Law and Procedure* §954, at 95 (12th ed. 1957). See also *Edelman v. California*, 344 U.S. 357, 364-365 (1953) (dissenting opinion).

¹⁸ See, e.g., Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 104-105, 111 (1962); 3 Stephen, *A History Of The Criminal Law Of England* 266-275 (1883); Douglas, *op. cit. supra* note 17, at 5-6; Lacey, *op. cit. supra* note 17, at 1206-1209; Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L.Rev. 603, 615-617 (1956).

"The act of 1904 . . . was intended to punish persons who are habitual loafers without means of support, and who have no trade, calling, or profession." *Tuggles v. Commonwealth*, 100 S.W. 235, 30 Ky.L.Rep. 1071 (1907).

Thus, in contrast to vagrancy statutes in many other states, the Kentucky statute does not make it a crime to loiter about at late and unusual hours "without any lawful business" and without being able "to give a good account."¹⁹ Such statutes plainly "are designed to prevent crime and if the officer must wait until a crime is committed, the preventive purposes of the statute wholly fail." *Beail v. District of Columbia*, 82 A.2d 765, 767 (D.C.Mun. App. 1951), *rev'd on other grounds*, 201 F.2d 176 (D.C.Cir. 1952).²⁰ Rather, the Kentucky statute defines as a vagrant the following types of persons:

"(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

"(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one; or

¹⁹ See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351, 1351-1352 (1950); Douglas, *op. cit. supra* note 17, at 6; Lacey, *op. cit. supra* note 17, at 1217-1219.

For a summary of state legislation, see Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 108-114 (1962).

²⁰ In general, this was the purpose of the second stage of vagrancy legislation in England. See Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 105-106 (1962); 3 Stephen, *op. cit. supra* note 18, at 274.

"(c) Any idle and dissolute able-bodied male person who purposely deserts his wife or children, leaving any of them without suitable subsistence or suitable means of subsistence; or

"(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city." Ky. Rev. Stats., § 436.520.²¹

This type of vagrancy statute reflects a moral judgment as to the sort of person described and a conviction that decent members of the community ought not to be subjected to undue contact with such ne'er-do-wells. But, plainly enough, the statute is not of the sort that is designed to permit the police to arrest on suspicion for interrogation.

3. *The arrest was not grounded upon the statute.* Despite the language of the statute, the officers in this case arrested petitioner and his co-defendants as if an "unable to give a good account" statute were in effect. While the officers did make a cursory inquiry into the economic condition of the defendants, the fundamental reason for the arrest was that the officers suspected that the defendants "[w]ere up for no good" (R. 18). See statement of facts, *supra*, pp. 7-10.

That our view of the evidence is accurate in this respect is confirmed by the fact that both the trial court and the Court of Appeals shared it. There is not a word in the opinion of either court relating to whether the officers

²¹ Other portions of the state vagrancy legislation are set forth at p. 4, *supra*. They require officers to "keep a watch" for vagrants, to tell them to go to work, and to disperse them when they are loitering, and they also place beggars in the category of vagrants.

had just cause for concluding that the defendants had "habitually loiter[ed] or ramble[d] about without means to support [themselves]," or that they had "habitually fail[ed] to engage in honest labor," or that they had "purposely desert[ed] [their] wi[ves] or children," or that they had "habitually refuse[d] to work." Rather, both courts concluded that the arrest was warranted because of the "suspicious circumstances" and the "suspicious reasons" given by the defendants for their presence on the street. R. 26, 168; 305 F.2d, at 175.

In short, the arrest was justified, both by the police and by the lower courts, upon the theory that there was probable cause to believe that the defendants were "guilty" of a "crime" not defined by the Kentucky statute. Assuming that the "not giving a good account" statutes are constitutional, which is a considerable assumption,²² surely

²² It seems quite doubtful that the Fourth Amendment's requirement that there be probable cause, rather than mere suspicion, to believe a person has committed a crime before he may be arrested can be satisfied by the expedient of making it a crime to act suspiciously, so that all that is required in effect is that there be probable cause to be suspicious. See Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351 (1950); Douglas, *op. cit. supra* note 17, at 9; Foote, *op. cit. supra* note 18, at 613-615; Laeey, *op. cit. supra* note 17, at 1217-1218; *Stoutenburgh v. Frazier*, 16 App. D.C. 229 (1900) ("suspicious person" vagrancy provision unconstitutional). It is quite common, however, as the commentators cited above point out, for the police to use vagrancy statutes in order to arrest on suspicion for interrogation. While that is plainly what happened in this case, it is not necessary, as we have noted, for the Court to consider the constitutionality of the statutes apparently authorizing this practice, because the statute in this case is not of that type.

It may be observed, however, that our suggestion as to the invalidity of "suspicion" vagrancy statutes does not necessarily extend to arrest-for-investigation statutes if they are hedged with adequate procedural safeguards. Such legislation would present a closer question. The particular vice of "suspicion" vagrancy laws is that there are no procedural safeguards, such as a limitation on the period of detention and the right to call counsel or family, and also that they make it a *crime* to act suspiciously.

where there is no such statute or its equivalent a "preventive" arrest cannot be valid.

4. *Assuming the arrest was grounded upon the statute, there was no probable cause.* If it be assumed that the arrest was really grounded upon the officers' belief that the men were vagrants within the meaning of the statute, nonetheless the arrest was invalid because there was no probable cause supporting such a belief.

For Fourth Amendment purposes, the dividing line with respect to arrests, with or without warrants, is between suspicion, on the one hand, and a judgment based upon "facts and circumstances [which would] warrant a prudent man in believing that the offense has been committed," on the other. *Henry v. United States*, 361 U.S. 98, 102 (1959). Even "strong reason to suspect" is not enough. *Id.*, at 101. See also, e.g., *Carroll v. United States*, 267 U.S. 132, 161-162 (1925). Moreover, "[w]hether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained." *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Thus, the question in this case is, as it was in *Wong Sun*, "whether the officers could, on the information which impelled them to act, have procured a warrant for the arrest of [defendants]." *Id.*, at 480.

The relevant facts which the officers could have presented to a magistrate were merely that petitioner and one of the other men were unemployed at the time, that the third man had been unemployed for six months, that they had only 25 cents among them in the car, and that they had been sitting in the car in the business section of the city for about five hours.²³

²³ We stretch a point here in favor of the government. In fact, the only basis for believing the men had been parked for five hours

We respectfully submit that it would be genuinely frivolous to suggest that such a showing would have been sufficient for a magistrate to conclude that there was probable cause to believe that these men had "habitually fail[ed] to engage in honest labor," or had "habitually refuse[d] to work," or had "habitually loiter[ed] or ramble[d] about," within the meaning of the Kentucky statute.

Apart from all other factors relevant to this question, consideration of the word "habitually" as it appears in each subsection demonstrates our point. This word makes explicit what has been the general view of the courts as to an essential characteristic of the "status crime" of vagrancy, i.e., that a pattern of action must be established before the crime is proved. Thus, persons become vagrants because of "many specific acts which make up their general course of conduct . . . in contradistinction to their committing a specific act." *Parshall v. State*, 62 Tex.Cr.App. 177, 138 S.W. 759, 766 (1911). And "the idleness and wandering about described in our vagrancy statute is aimed at a mode of life, and certainly not at one isolated instance of idleness of only a few hours duration at most." *Brooks v. State*, 33 Ala.App. 390, 34 So.2d 175, 177 (1948). See, generally, Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L. Rev. 102, 114-116 (1962), and cases there cited, and other sources cited in note 17, *supra*.

was the word of an unidentified informant with whom, so far as appears, the police had had no previous experience. It is most doubtful that this would have sufficed. See *Wong Sun v. United States*, 371 U.S. 471, 480-483 (1963).

In addition, the officers would have had to concede that one of the defendants claimed ownership of the car. And while he did not have title papers with him, surely the presumption must be that a person who is sitting in a car and says he owns it generally is telling the truth, as Sykes was in this case.

As to such a crime, the facts that the officers could have related to a magistrate certainly would have been insufficient to do more than arouse a mere suspicion. The deficiency of such a showing is perhaps best demonstrated by considering the questions the officers did *not* put to the men. Thus, for example, they did not ask about efforts the men had made to secure employment; they did not ask whether they had wives and children; they did not ask what their resources were apart from the 25 cents they had with them; they did not ask how they had occupied themselves since they were out of work; they did not ask why they had lost their jobs; they did not ask how many jobs they had had or to what extent they had been unemployed in the past; and, when they discovered at the station that petitioner had an artificial leg, it apparently never occurred to them that he might not be "able-bodied" within the meaning of the statute.

That these questions were unasked, of course, is perfectly understandable, since it is obvious that at the most the officers were thinking of the vagrancy statute only as an excuse for bringing to the station for questioning persons they thought were acting suspiciously. In such circumstances, as we have indicated, we contend that the statute should not even be considered, but that rather the government should be held to the true reason for the arrest. But even if the statute is considered, the government's position is in no way advanced, because a magistrate could not validly have issued a warrant to arrest the defendants for violation of the Kentucky statute on the basis of the facts known to the officers.

B. THE ARREST WAS INVALID BECAUSE THE VAGRANCY STATUTE IS UNCONSTITUTIONAL.

Apart from the consideration of probable cause, we submit that the arrest was invalid because the vagrancy statute itself is unconstitutional on its face.

We take it that, if the case can be disposed of favorably to petitioner on other grounds, the Court will probably not reach this issue, involving as it does the validity of a state statute which is of ancient lineage and which is typical of statutes in many other states. Since the other grounds for reversal appear strong, consequently, we consider it inappropriate to tax the Court with an extended discussion of the constitutionality question.

However, we wish to preserve the issue in the event we are mistaken as to the merit of our other arguments. Moreover, in view of the widespread impact of statutes of this type upon persons ill equipped to mount a constitutional challenge, it is arguable that the normal considerations supporting the deferral of constitutional issues are not persuasive in this case. Therefore, we state our argument, but we do it as briefly as possible.

The vice of the Kentucky statute is that it is unconstitutionally vague. While the Kentucky Court of Appeals sustained the statute against such an attack in *Adamson v. Hoblitzell*, 279 S.W.2d 759 (1955), practically without discussion,²⁴ and while most, but not all, other state court decisions are in accord,²⁵ it is difficult to see how the *Adamson*

²⁴ The relevant portion of the opinion is as follows:

"Some suggestion is made that the entire vagrancy statute is void because it is vague and indefinite. It will suffice to say that substantially similar statutes in other states have been upheld against attacks on the ground of vagueness, indefiniteness and uncertainty. . . ." *Id.*, at 760.

²⁵ See Annots., 9 A.L.R. 1366, 111 A.L.R. 68; Note, *Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons*, 59 Yale L.J. 1351, 1353 (1950) and cases cited; Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 124-125 (1962) and cases cited; Douglas, *op. cit. supra* note 17, at 7-8, and cases cited. For decisions striking down particular vagrancy statutes, see *In re Newbern*, 53 Cal.2d 786, 350 P.2d 116 (1960); *People v. Belcastro*, 356 Ill. 144, 190 N.E. 301 (1934); *Territory of Hawaii v. Anduha*,

holding can be squared with the standards established by this Court with respect to the precision required in criminal statutes by the Fourteenth Amendment.²⁶

In particular, we rely upon *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), where the Court struck down as unconstitutional a state statute declaring it a crime to be a "gangster," defined as "Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime. . . ." *Id.*, at 452. The Court phrased the due process requirement as follows:

" . . . No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. The applicable rule is stated in *Connally v. General Construction Co.*, 269 U.S. 385, 391: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a

31 Haw. 459 (1930), *aff'd*, 48 F.2d 171 (9th Cir. 1931); *Mayor of Memphis v. Winfield*, 8 Humph. 747 (Tenn. 1848); *Stoutenburgh v. Frazier*, 16 App.D.C. 229 (1900); *People v. Alterie*, 356 Ill. 307, 190 N.E. 305 (1934); *City of St. Louis v. Gloner*, 210 Mo. 502, 109 S.W. 30 (1908); *cf. Pinkerton v. Verberg*, 78 Mich. 573, 584, 44 N.W. 579, 582 (1899).

²⁶ While each statute, of course, must be judged separately, with respect to the vagueness problem of vagrancy statutes generally see Douglas, *op. cit. supra* note 17, at 7-8; Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U.L.Rev. 102, 121-125 (1962); Lacey, *op. cit. supra* note 17, 1221-1222; Comment, *Who Is a Vagrant in California*, 23 Cal. L. Rev. 506 (1935).

statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " *Id.*, at 453.

The Court held that, on this standard, the word "gang" was unconstitutionally vague, as was the phrase "known to be a member." The Court also observed that the "generality of the language" of the clause "any person not engaged in any lawful occupation" raised "serious doubts" as to its adequacy. *Id.*, at 458.

Another relevant case is *Edelman v. California*, 344 U.S. 357 (1953). There the Court did not reach the "serious constitutional questions" as to the validity of a California vagrancy statute applying to "[e]very . . . dissolute person," because the question had not been properly raised in the state court. *Id.*, at 358-359. Mr. Justice Black, however, joined by Mr. Justice Douglas, thought the issue was properly before the Court, and concluded, "It would seem a matter of supererogation to argue that the provision of this vagrancy statute on its face and as enforced against petitioner is too vague to meet the safeguarding standards of due process of law in this country." *Id.*, at 366. Mr. Justice Black noted in particular the similarity between the California statute and the statute held invalid in *Lanzetta*. *Id.*, at 364 n. 2.

Finally, in *Winters v. New York*, 333 U.S. 507 (1948), Mr. Justice Frankfurter, joined by Mr. Justice Jackson and Mr. Justice Burton, while dissenting from the holding that the statute there involved was unconstitutionally vague, observed with respect to *Lanzetta*:

"The case involved a New Jersey statute of the type that seek to control 'vagrancy.' These statutes are in

a class by themselves, in view of the familiar abuses to which they are put. . . . Definiteness is designedly avoided so as to allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense. In short, these 'vagrancy statutes' and laws against 'gangs' are not fenced in by the text of the statute or by the subject matter so as to give notice of conduct to be avoided." *Id.*, at 540.

We submit that, measured by the due process standard applied in *Lanzetta*, the various provisions of the Kentucky statute are invalid.²⁷ In order to avoid unduly extending this discussion, we consider only one of the various questionable terms in each of the subsections.

Subsection (a) applies to a person who, among other things, "habitually loiters or rambles about." There is no specification of place, time, or purpose, so that, for all that appears, anyone who is indigent is guilty if he "habitually" walks around anywhere in the state; and apparently he cannot escape liability if he stops "rambling," because then he would be "loitering." Surely this is not what the legislature intended; but there is no way to draw a line between what was intended and what was not. Cf. *Territory of Hawaii v. Anduha*, 48 F.2d 171 (9th Cir. 1931) (loitering statute unconstitutional).

Subsection (b) applies to persons who do not work for their own support or the support of their family if they are

²⁷ "That opinion [*Lanzetta*] certainly casts doubt upon the validity of many of these [vagrancy] statutes, for perhaps the majority of them are framed in language as general as that of the New Jersey act. . . ." Lacey, *op. cit. supra* note 17, at 1222.

It may be noted that most of the state court opinions upholding vagrancy statutes antedated *Lanzetta*. *Ibid.*

also "without visible means of support." While this phrase is admittedly ancient and while it has been widely used, neither age nor usage has clarified its almost hopeless obscurity. What is a "visible" means of support? "Visible" to whom? One would think that cash would qualify, even though carried in one's pocket, but *Branch v. State*, 73 Tex. Crim. Rep. 471, 165 S.W.2d 605 (1941), held that it does not. See also *People v. Cramer*, 247 N.Y.S. 821, 824, 139 Misc. 545 (1930) (possession of money or lack of it is neither proof positive of visible means of support or the absence of it); *People on Complaint of Moody v. Johnaken*, 94 N.Y.S.2d 102, 104, 196 Misc. 1059 (1950) ("Just what constitutes 'visible means of support' is difficult of precise definition or measurement."); and compare *Rex v. Munroe*, 25 Ont. L.R. 223, 19 Can.Crim.Cas. 86 (1911) (money obtained by begging not "visible means of support"), with *Rex v. Sheehan*, 14 B.C. 13, 14 Can.Crim.Cas. 119 (1908) (money acquired by gambling was "visible means of support"). And to what extent must the "visible means" provide "support"? What of the person who wants little of material things and who works only as the need arises? If he has \$5.00 and it will last him a week, has he or has he not "visible means of support"? Or what of the idle son who depends on the largess of his parents?

While one can only speculate about the intent of the Kentucky legislature in using this phrase, it seems likely that in early English statutes this type of language was designed to describe the "rogues and vagabonds" of Elizabethan days who constituted the "brotherhood of beggars" and were easily enough identified. Thus "visible" would mean "known to the community to be lawful." But, as Lord Justice Scott observed in the leading case of *Ledwith v. Roberts* [1937], 1 K.B. 232, 276-277 (C.A. 1936), which con-

firmed the shift in England from status criminality to action criminality in vagrancy prosecutions:

" . . . It seems to me wrong that these old phrases should still be made the occasion of arrest and prosecution, when . . . [t]he class against which the legislation was directed has ceased to exist. . . . The old phrases have to-day lost their meaning, but they remain on the Statute Book as vague and indefinite words of reproach. . . . Clear and definite language is essential in penal laws."

As to subsection (c), which relates to men who desert their families, we need raise no question since plainly it is not involved in this case. However, we observe that it applies only to those who are "idle and dissolute," terms which, we submit, simply defy any reasonably particular definition. See *Edelman v. California*, 344 U.S., at 364-365.

Finally, subsection (d) suffers from the same type of infirmity as subsection (a) in that it applies to persons who "habitually loiter." It is true that this subsection is somewhat narrower than subsection (a) in that at least it requires loitering "on the streets or public places"; but this is not sufficient to advise a person without work anything except that, if he spends any substantial amount of time outside his home without any particular purpose, he may be arrested. Again, the legislature should not be assumed to have legislated with a view toward simply excluding paupers from the streets if they refuse to work; but this is the sweep of the statute, so far as the language provides any guidance.

Finally, apart from the vagueness issue, we submit that the state may not, without running afoul of the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment, pun-

ish a person criminally simply for acquiring the status of one who habitually refuses to work and thereby becomes a pauper. Cf. *Ex Parte Hudgins*, 86 W.Va. 526, 103 S.E. 327 (1920) (vagrancy statute which applied to any able-bodied man between 16 and 60 who did not work 36 hours a week unconstitutional). To be sure, a state may undoubtedly legislate in many ways to cope with the problem of persons becoming public charges through their own deliberate actions. Presumably public relief could be withheld except on condition that they seek gainful employment, for example; or acceptance of relief without genuinely attempting to secure a job might be made a crime. But the power asserted by the state in the Kentucky statute appears quite similar to that denied to California by this Court in *Robinson v. California*, 370 U.S. 660 (1962), where the Court struck down as cruel and unusual punishment a state's criminal sanction upon narcotics addiction. Just as there is nothing intrinsically evil about narcotics addiction, though there may be about the things one does in becoming an addict or after he is one, *id.*, at 666-667, so too there is nothing intrinsically evil about being a pauper, even willingly, though one may commit anti-social acts in part because he is one. As in *Robinson*, it is the act that is the appropriate subject of sanction, not the condition.

III.

Assuming Arguendo the Validity of the Arrest, the Search and Seizure Were Nonetheless Invalid.

Even if it be assumed that the arrest was legal, the search and seizure without a warrant were nonetheless invalid because not within the incident to arrest exception to the warrant requirement nor within the exception pertaining to movable vehicles.

A. THE SEARCH AND SEIZURE CANNOT BE JUSTIFIED ON THE BASIS OF THE DOCTRINE OF *CARROLL V. UNITED STATES*.

While this Court has sanctioned searches of automobiles without warrants even prior to arrest, this principle is applicable only where the officers have probable cause to believe that the car contains contraband (or perhaps other permissible objects of seizure) and "where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Carroll v. United States*, 267 U.S. 132, 153 (1925). See also *Husty v. United States*, 282 U.S. 694 (1931); *Scher v. United States*, 305 U.S. 251 (1938); *Brinegar v. United States*, 338 U.S. 160 (1949).

Here, the officers had no probable cause to believe any proper object of seizure was in the car, nor even that any incriminating evidence was there.²² There is no suggestion in the record that the interrogation of the defendants disclosed anything beyond what the officers knew when they made the arrests, and, as we have indicated, that amounted to practically nothing. Certainly the officers could not have obtained a search warrant, for they could not have made a sworn showing as to the likelihood that particular objects which the state had a right to seize were in the car.

²² The Court has consistently held that a search, with or without a warrant, may not be made for articles that are "merely evidentiary," but that rather the objects of search must be "the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property; weapons by which escape of the prisoner arrested might be effected, and property the possession of which is a crime." *Harris v. United States*, 331 U.S. 145, 154 (1947) [footnote omitted]. See also *Boyd v. United States*, 116 U.S. 616 (1886); *Gould v. United States*, 255 U.S. 298, 309 (1921); *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Carroll v. United States*, 267 U.S. 132, 158 (1925); *Marron v. United States*, 275 U.S. 192, 198-199 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 465-466 (1932); *Abel v. United States*, 362 U.S. 217, 237-239 (1960).

Moreover, inasmuch as the car was in the custody of the police, as well as all of the men who had been in it, it could hardly be argued that the car could "be quickly moved out of the locality or jurisdiction."

In short, the *Carroll* doctrine is inapplicable, so that the search and seizure must be justified, if at all, on the basis of the incident to arrest doctrine.²⁹

B. WHERE THE ARREST IS FOR VAGRANCY, NO INCIDENTAL SEARCH SHOULD BE PERMITTED BEYOND THAT NECESSARY TO PROTECT THE OFFICERS AND TO PREVENT ESCAPE.

With respect to the incident to arrest exception to the warrant requirement, where the arrest is for vagrancy the type of search here involved cannot be justified. More particularly, we submit that, in connection with such an arrest, the only type of search that is permissible without a warrant is that which is designed to protect the arresting officers and to make the arrest effective. Thus, while the officers may have the right to search the person arrested (and perhaps at the same time to search an automobile if the person is arrested in it) in order to uncover weapons or other possible means of escape or attack, they have no right to conduct a search that is broader in any respect.

This limitation upon the right to search incident to arrest arises from the analysis by this Court of the nature of that right. So far as we have discovered, the Court has never deviated from, nor expanded upon, the statement in *Agnello v. United States*, 269 U.S. 20, 30 (1925), as to the purpose to be served by a search incident to arrest, namely, "in order to find and seize things connected with the crime as its fruits

²⁹ It perhaps is worth noting specifically that the plain implication of the *Carroll* line of decisions is that the protection of the Fourth Amendment extends to searches of automobiles. See also cases cited *infra*, pp. 51-53.

or as the means by which it was committed, as well as weapons and other things to effect an escape from custody." 269 U.S., at 30. See *Weeks v. United States*, 232 U.S. 383, 392 (1914); *Marron v. United States*, 275 U.S. 192, 198-199 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 465 (1932); *Harris v. United States*, 331 U.S. 145, 153 (1947); *United States v. Rabinowitz*, 339 U.S. 56, 61-64, 64 n. 6 (1950); *Abel v. United States*, 362 U.S. 217, 237 (1960).

Where the officers' purpose has been broader, so that the search was for any evidence that would incriminate the person arrested, the Court has consistently held the search and seizure unconstitutional as the type of general search that the Fourth Amendment was designed to prevent. See, e.g., *Boyd v. United States*, 116 U.S. 616, 625-629 (1886); *Weeks v. United States*, *supra*, at 393-394; *Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1931); *United States v. Lefkowitz*, *supra*, at 465; *Kremen v. United States*, 353 U.S. 346 (1957). Cf. *Wong Sun v. United States*, 371 U.S. 471, 481 n. 9 (1963). See also *Harris v. United States*, *supra*, where the officers uncovered certain articles that were the means of committing a crime other than the one for which the individual had been arrested, and where the Court upheld the seizure in part on the ground that the motive of the search had not been to find such items. Rather, "[t]he search was not a general exploration but was specifically directed to the means and instrumentalities by which the crimes charged [in the arrest] had been committed" 331 U.S., at 153. For a similar decision, see *Abel v. United States*, *supra*, at 238.

Applying this standard to searches and seizures incident to arrests for vagrancy, it seems evident that nothing beyond a search for weapons and means of escape can be justified, since it could hardly be contended that such a search is designed to uncover the "means or instrumentali-

ties" for committing, or the "fruits of" the crime of vagrancy. In this respect the concurring judge in the Court of Appeals was correct, 305 F.2d, at 177; although it is difficult to understand what led him to join in the judgment unless it was the impermissible consideration that the search actually turned up incriminating evidence.

Petitioner's argument is supported by *White v. United States*, 271 F.2d 829 (D.C. Cir. 1959). At issue in that case was the legality of a search of a person who was arrested for vagrancy and the seizure from him of certain items tending to establish the different crime of which he was ultimately convicted. Judge Fahy, writing for the court, held that the action of the officer in requiring petitioner to disrobe in a doorway (obviously because he thought defendant might have narcotics in his possession) was unconstitutional. "It was quite unjustified by any necessity to prevent the destruction of evidence, to prevent flight, or by any other good reason." *Id.*, at 831. See also *People v. Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350, 351 (1956), where the court held:

"The search, which . . . was of an automobile in which appellants were traveling at the time of their arrest, was made without a warrant. Obviously, the search [which uncovered narcotics] bore no relation to the traffic violation nor to the vagrancy charges upon which appellants were booked and, therefore, was not justified as incidental to the arrest therefor. . . ."

And cf. *Charles v. United States*, 278 F.2d 386, 388 (9th Cir. 1960), where the court stated that, with respect to a search of premises, "When a search [for narcotics] has nothing to do with the arrest [for assault], it cannot be deemed incident to the accused's apprehension."

The situation in the case at bar is closely analogous to searches incident to arrests for minor traffic violations. While the state courts are not in agreement as to the proper scope of such a search, the better reasoned opinions restrict it at least to a search of the person.³⁰ See *People v. Mayo*, 19 Ill. 2d 136, 166 N.E.2d 440 (1960); *People v. Zeigler*, 358 Mich. 355, 100 N.W.2d 456 (1960); *Brinegar v. State*, 97 Okla. 299, 262 P.2d 464 (1953); *Elliott v. State*, 173 Tenn. 203, 116 S.W.2d 1009 (1938); *People v. Molarius*, *supra*; cf. *People v. Sanson*, 156 Cal. App. 2d 350, 319 P.2d 422, 424 (1957); *People v. Blodgett*, 46 Cal. 2d 114, 293 P.2d 57, 58 (1956). Indeed, the Illinois Supreme Court, in an opinion by Justice Schaeffer, concluded that in normal circumstances such an arrest does not even justify a search of the driver. *People v. Watkins*, 19 Ill. 2d 11, 166 N.E.2d 433, 437 (1960). As the court stated the rationale in *People v. Gonzales*, 356 Mich. 247, 97 N.W.2d 16, 20 (1959), where the arrest had been for driving with only one headlight burning:

"There were no fruits of the traffic offense to search for, nor any need to search for the means by which it had been committed. And since no further detention was contemplated, there was no need to search for weapons or other means of possible escape from custody."

The case at bar underscores the necessity for requiring that incidental searches be related to the crime for which the arrest is made. The exploratory character of the search by the officers is plain. They surely could not have secured

³⁰For general discussions and citations to opposing authorities, see Note, *Search Incident to Arrest for Traffic Violations*, 6 Wayne L.Rev. 413 (1960); Simeone, *Search and Seizure Incident to Traffic Violations*, 6 St. Louis L.J. 506 (1961); 1 Varon, *Searches, Seizures and Immunities*, 107-108 (1961).

a search warrant prior to their discovery of the weapons, for they had no basis whatsoever to support a belief that particular items that the government might have a right to seize would be in the car.³¹ Nor, for that matter, did they have that sort of information even after they had discovered the guns, since at that point they had secured no evidence that the defendants were planning a robbery. To be sure, after Sykes had confessed, the officers might have been able to obtain a warrant—but the point is, of course, that they were not content to wait until they could satisfy a magistrate. Rather, they went ahead with the search on the basis of their own suspicion, and when they found the incriminating evidence they used it as a lever to pry a confession out of Sykes.

C. EVEN ASSUMING THAT A BROADER SEARCH MAY BE MADE INCIDENT TO AN ARREST FOR VAGRANCY, IN THIS CASE THE SEARCH AND SEIZURE WERE NOT INCIDENT TO THE ARREST.

If it be assumed that, even though the arrest was for vagrancy, the search could be of the same scope as where the arrest is for other crimes, the search and seizure in this case were nonetheless invalid.

1. *The search and seizure were not closely enough related to the arrest in terms of time and place. A fatal de-*

³¹ And it cannot be contended, we submit, that the discovery of the guns was not the product of a "search" within the meaning of the Fourth Amendment. Whatever the officers' intent may have been at the outset in searching the car, they were on notice as a matter of law that this was a citizen's property as to which they were required to adhere to the requirements of the Fourth Amendment. Moreover, it is difficult to believe that the officers were so solicitous of the defendants that, when one asked for cigarettes, they commissioned three officers to go to the car to find some. Plainly enough, the purpose was to search for evidence; as one of the officers indicated. See statement of facts, *supra*, p. 11.

fect in the search and seizure in the case at bar is that they were not closely enough related to the arrest in terms of time and place. This Court has never deviated from the rule that, for a search and seizure to be incident to an arrest, the events must take place contemporaneously and at the same place. Thus, in *Weeks v. United States*, 232 U.S. 383 (1914), the Court held invalid a search of a person's home without a warrant where he had been arrested earlier in the day while on his job. And in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the Court regarded as unconstitutional a search of an office that took place after an arrest in the suspects' homes. This line of authority culminated in *Agnello v. United States*, 269 U.S. 20 (1925), where the Court struck down as unconstitutional a search of a house several blocks from the place of arrest immediately following the arrest. As the Court put it, while where there is an arrest there is also a right to search "contemporaneously" "the place where the arrest is made," that right "does not extend to other places." *Id.*, at 30.²²

By this test, the search and seizure in the case at bar do not fall within the incident to arrest exception. The search and seizure occurred not at the place of arrest, but at a garage to which the auto had been towed; and it took place

²² For lower court decisions applying this time and place rule, see, e.g., *Mosco v. United States*, 301 F.2d 180 (9th Cir. 1962); *Herschkowitz v. United States*, 65 F.2d 920 (6th Cir. 1933); *Papani v. United States*, 84 F.2d 160, 163 (9th Cir. 1936); *United States v. Lee*, 83 F.2d 195, 196 (2d Cir. 1936); *United States v. Stappenback*, 61 F.2d 955 (2d Cir. 1932); *Hurst v. State of California*, 211 F.Supp. 387, 392 (N.D. Cal. 1962); *United States v. Royster*, 204 F.Supp. 760, 762 (N.D. Ohio 1961); *United States v. Rutheiser*, 203 F.Supp. 891, 892 (S.D. N.Y. 1962); *United States v. Steck*, 19 F.2d 161, 162 (W.D. Pa. 1927); *United States v. Swan*, 15 F.2d 598, 599 (N.D. Cal. 1926); *United States v. Vallos*, 17 F.2d 390, 392 (D. Wyo. 1926); *United States v. Fowler*, 17 F.R.D. 499, 501 (S.D. Cal. 1955).

not contemporaneously with the arrest, but from 15 to 30 minutes after the arrest—a time lapse which arguably might be overlooked if the men were still at the scene of the arrest, but which in this case represents the time taken to remove the men to the station, book them, search them, and begin interrogation. See *Ker v. California*, 374 U.S. 23, 42 n. 13 (1963) (“In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances . . . supported the Court’s holdings that searches without warrants were unconstitutional.”) See also *Lustig v. United States*, 338 U.S. 74, 79-80 (1949).

2. *There was time for the officers to obtain a warrant.* The general rule of the Fourth Amendment is, of course, that the government cannot search or seize without the authority of a search warrant. In *Trupiano v. United States*, 334 U.S. 699 (1948), the Court held that this policy was so important that a search at the time of arrest was invalid, insofar as it extended beyond the person arrested and objects within his actual physical control, because there had been ample time to secure a warrant. While this requirement was subsequently rejected in *United States v. Rabinowitz*, 339 U.S. 56 (1950), in favor of a more flexible test as to the reasonableness of a search and seizure, we suggest that under *Rabinowitz* the failure to secure a warrant may still be decisive in appropriate circumstances, and, more particularly, that it should be considered decisive in this case.

In *Rabinowitz*, the Court held that “[t]o the extent that *Trupiano v. United States*, 334 U.S. 699, requires a search warrant solely on the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled.” *Id.*, at 66 (emphasis supplied). And in *Ker v. California*, 374 U.S. 23, 41

(1963), the Court observed that, under *Rabinowitz*, "The practicability of obtaining a warrant is not the *controlling* factor . . ." (Emphasis supplied.) The implication appears to be that failure to secure a warrant may or may not be important, depending on the circumstances.

This interpretation of *Rabinowitz*, which was adopted in *Rent v. United States*, 209 F.2d 893, 899 (5th Cir. 1954), and in *Clay v. United States*, 239 F.2d 196, 204 (5th Cir. 1956), is supported not only by the language employed by the Court, but also by the general tenor of the *Rabinowitz* opinion. In the first place, it would be difficult to square the broad *Rabinowitz* approach to Fourth Amendment questions, under which a variety of considerations are relevant, with an absolute rejection of the relevance of the failure of the police to secure a warrant where there was ample opportunity, especially in view of the emphasis this Court has placed upon this consideration in other decisions. See *Go-Bart Co. v. United States*, 282 U.S. 344, 358 (1931); *Taylor v. United States*, 286 U.S. 1, 6 (1932); *McDonald v. United States*, 335 U.S. 451, 454-455 (1948); *United States v. Jeffers*, 342 U.S. 48, 51-52 (1951); and *Chapman v. United States*, 365 U.S. 610 (1961).

Moreover, in *Rabinowitz* the Court appeared to be concerned principally with the problems involved in second-guessing the police as to whether it had in fact been "practicable" to secure a warrant, 339 U.S., at 65. But while this may be undesirable in the general run of search incident to arrest cases, at the same time there may well be cases in which it is indisputably clear that the police could have secured a warrant without impairing their effectiveness in enforcing the law. In such a situation, the practical considerations that troubled the Court in *Rabinowitz* are not present, and in consequence the general rule of the

Fourth Amendment that a warrant be secured should be followed.

In the case at bar, of course, it requires no argument to establish that the officers had every opportunity to secure a warrant. With the car in their custody and its former occupants in jail, it is difficult to imagine any excuse for not obtaining a warrant—apart from the consideration that a magistrate would have refused one—except perhaps “inconvenience of the officers and delay in preparing papers and getting before a magistrate. . . . But these reasons are no justification for by-passing the constitutional requirement. . . .” *McDonald v. United States*, *supra*, at 455.

3. *Lower court decisions support petitioner.* While it cannot be said that the decisions of the lower federal courts are entirely in harmony with respect to the right of officers to search cars incident to arrests, the most persuasive of those decisions are those which adhere to the principles outlined above with respect to the practicability of securing a warrant and the relationship in time and place of the search to the arrest.

Thus, in *United States v. Stoffey*, 279 F.2d 924 (7th Cir. 1960), the court held illegal a search of an automobile that was parked outside the building in which the arrest was made. The arrest took place only five minutes before the search of the auto, although the person arrested had effectively been in the control of the officers from the time he walked into the building about 3 hours before the arrest. The court stated:

“It is clear that from 11:50 A.M. [when he entered] until 2:50 P.M. [when he was arrested] this automobile was immobile. . . . While he had the keys to the car in his possession until 2 P.M., he could not get out of the tavern to get into the car. . . . The agents had no search warrant for the car. They had plenty of time

to secure a search warrant. The seizure of the car was not incidental to the arrest of defendant. The arrest both in fact and in law was consummated before the car was seized. There was no risk of the car being driven away while a search warrant was being obtained.

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" . . . We are not here confronted with an arrest of defendant in his automobile. Neither are we confronted with a case where law enforcing officers find it necessary to make a search in a moving automobile or one which has been temporarily halted and which may be moved away by the occupant at any moment. . . ." *Id.*, at 928-929.

To the same effect is *Rent v. United States*, 209 F.2d 893 (5th Cir. 1954), where, after arresting the suspect while in the car, the police took the car into custody for the purpose of searching it, but did not actually make the search until after a lapse of 10 hours. The court held that the search had not been contemporaneous with the arrest within the *Agnello* rule, and also that the officers "had ample opportunity to apply for a search warrant." *Id.*, at 899. As the court observed, the reason for distinguishing between cars and houses did "not exist in this case. The automobile was at rest, was actually in the custody of the officers, locked, and not likely to be disturbed." *Id.*, at 897.

Even closer to the facts of the present case, perhaps, is *Shurman v. United States*, 219 F.2d 282 (5th Cir. 1955). There, the court held that a search was unconstitutional where the officer had arrested the suspects after stopping their car on the highway, had taken them to a justice of the police court to leave them in the custody of another officer,

and had returned to search the car. The court was of the view that, as in *Rent*, "[t]he lack of a warrant could not be excused, either under the principle of search incident to arrest, the search and the arrest not having been contemporaneous; or under *Carroll v. United States* . . . because the danger that the automobile might be quickly moved from the locality . . . was lacking under these circumstances." *Id.*, at 286. See also *Clay v. United States*, 239 F.2d 196, 204 (5th Cir. 1956); *Mosco v. United States*, 301 F.2d 180, 184, 188 (9th Cir. 1962); *Weaver v. United States*, 295 F.2d 360 (5th Cir. 1961); *United States v. Kidd*, 153 F.Supp. 605, 610 (W.D. La. 1957).

4. *The crime of vagrancy was not committed in the presence of the officers.* The fact that no crime of vagrancy was actually committed in the officers' presence also appears to be relevant to the question of the reasonableness of the search and seizure.

This Court has consistently regarded the question whether a crime was committed in the presence of the arresting officers as an important consideration in judging the constitutionality of a contemporaneous search and seizure. See *Agnello v. United States*, 269 U.S. 20, 30 (1925); *Go-Bart Co. v. United States*, 282 U.S. 344, 357 (1931); *McDonald v. United States*, 335 U.S. 451, 462-463 (1948) (dissenting opinion); *Harris v. United States*, 331 U.S. 145, 155 (1947); *United States v. Rabinowitz*, 339 U.S. 56, 64 (1950); *Marron v. United States*, 275 U.S. 192, 198-199 (1927); *United States v. Lefkowitz*, 285 U.S. 452, 463, 465 (1932).

In the case at bar, consequently, assuming *arguendo* the correctness of the lower court's view that the question whether the defendants actually committed the crime of vagrancy in the officers' presence is irrelevant to the legality of the arrest, see discussion *supra*, pp. 25-27, this does not

mean that this question is irrelevant to the legality of the search and seizure. And if the question is to be answered on the basis of the facts of record, there can be little doubt not only that the crime of vagrancy, as defined in the statute, was not proved, but that in fact it was not committed. As we have indicated in the statement of facts, *supra*, pp. 13-14, the testimony of the defendants was undisputed that they all had families, that they all had trades, and that, while they were temporarily out of work, they all had tried to secure employment. Moreover, petitioner not only had an artificial leg but had been recently injured; and his testimony as to his injuries and as to his diligent efforts to secure employment were corroborated by the testimony of the person in whose house he was residing.

IV.

Petitioner Was Deprived of Effective Assistance of Counsel.

There is yet one additional constitutional flaw in the judgment against petitioner that, because of its character, we feel obliged to call to the Court's attention, even though it was raised neither at trial nor upon appeal. That defect is that petitioner was deprived of his Sixth Amendment right to effective assistance of counsel.

As we have noted, two counsel were appointed by the trial judge to represent the three defendants jointly (R. 5), and that is what they did. The difficulty with this arrangement was that, in view of the diversity of interests among the defendants, this joint representation was at odds with the principle established in *Glasser v. United States*, 315 U.S. 60 (1942), that "the Sixth Amendment contemplates that such assistance [of counsel] be untrammelled and unim-

paired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." *Id.*, at 70.

It seems most doubtful that, in the normal case of joint representation by court-appointed counsel, any specific showing of probable prejudice should be required, at least unless it appears on the surface that the defendants were identically situated. As the Court observed in *Glasser*, "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." *Id.*, at 76. In any event, it is quite clear in the case at bar both that the interests of the defendants were disparate and that petitioner's defense was adversely affected by the joint representation.

The evidence against petitioner, as we have indicated, see *supra*, pp. 16-18, was weak, but the evidence against Sykes was much stronger. The incriminating articles had been seized in the trunk and glove compartment of his car, and he had confessed. Consequently, one obvious approach for petitioner's counsel would have been to disassociate petitioner from Sykes, even at the cost of weakening Sykes' defense.

For example, Sykes had confessed to two different versions of the robbery plan, one of which implicated petitioner and Strunk (R. 145-148) and one of which did not (R. 140-144). Petitioner's counsel could have stressed the confession that did not involve petitioner, and in addition he could have attacked Sykes' credibility in general. But either of these courses would have undermined Sykes' defense, especially in view of his disavowal of both confessions when he took the stand. Moreover, it is doubtful that petitioner's defense was aided by counsels' efforts to establish that no one in the car knew about the articles in the trunk (R. 190, 224-226); but they could not suggest the most reasonable explanation

—that the owner of the car put them there—without disadvantaging their client Sykes.

Counsel's dilemma is perhaps best demonstrated by the manner in which they attempted to deal with Sykes' testimony during their closing argument. They said:

"... Now, my own impression here is that we had a little fish in a big puddle making a big noise. You can make up your own mind as to whether or not Mr. Sykes was telling the truth [to the police and the FBI] or whether he was telling a falsehood. You heard him testify from the stand, you know his character, you can recognize his propensities from what he has said and from what the evidence has shown. I think possibly that this confession and everything that has been connected with it was best characterized in the statement of another witness, the other defendant, Mr. Strunk, who said sometimes his brother-in-law has some pretty grandiose ideas" (R. 261-262).

This reflects an acute awareness of the necessity for attacking Sykes, tempered by the realization that, in the circumstances of the joint representation, the attack had to be framed in such a way as not to injure him.

Additional examples could be cited, but the foregoing appear sufficient to establish the existence of a conflict of interests and the probability of prejudice. It may be observed in addition, however, that this was a conspiracy trial, and that in such a proceeding, as the Court pointed out in *Glasser*, "where the liberal rules of evidence and the wide latitude accorded the prosecution may, and sometimes do, operate unfairly against an individual defendant, it is especially important that he be given the benefit of the undivided assistance of his counsel. . . ." 315 U.S., at 76.

As we have indicated, this issue has not been raised in this case until this point.³³ However, the error was, we submit, plain. Moreover, it is in no sense a mere technicality. Rather, especially in the circumstances of this case where the proof against petitioner was hardly conclusive, deprivation of the right to counsel has a direct bearing upon the correctness of the verdict of the jury. Consequently, since there is no jurisdictional barrier to this Court's considering the question, we respectfully urge that it do so if it develops that otherwise the judgment of conviction would be affirmed.

V.

Conclusion

What happened in this case was precisely what the Fourth Amendment was designed to prevent. The officers arrested three men sitting in a car on a main street because the officers thought they were "evasive" in responding to questions. On any realistic appraisal of the record, it is clear enough that the officers simply wanted the opportunity to question the men more closely in the environment of the police station. When the initial interrogation was not productive, the officers decided upon searching the car on the chance that they would find something—anything. When they did, they were able to elicit an incriminating statement from one defendant. From start to finish, the officers acted on sus-

³³ It may be noted that the counsel appointed for trial also represented the defendants on the appeal. See 305 F.2d, at 173.

Except as it might be said that counsel had an obligation to raise the conflict of interests issue, we do not suggest that they were ineffective. To the contrary, the record discloses that they were experienced and intelligent counsel. If, for Sixth Amendment purposes, blame must be placed, it falls as much on the trial judge, who should have recognized the obvious conflict of interests, as it does upon trial counsel, and perhaps more. At any rate, wherever the blame is placed, it cannot be upon petitioner.

picion alone without the sanction of a magistrate's determination.

Indeed, even after the police had made a clean sweep of Fourth Amendment safeguards, they were able only to secure enough evidence to prosecute petitioner, not for robbery or even for attempted robbery, but for conspiracy to rob. The jury was turned loose upon a mass of ambiguous and conflicting evidence and was asked to determine whether the defendants simply talked about robbery or whether they actually agreed to rob a particular bank. They came up with a verdict against the defendants, but it is difficult to escape the feeling that, just as the police acted on suspicion throughout, so did the jury.

In these circumstances, we submit that the judgment of the Court of Appeals should be reversed.

Respectfully submitted;

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. 302-308) is reported at 305 F. 2d 172.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1962 (R. 309), and a petition for rehearing was denied on August 31, 1962 (R. 310). On October 11, 1962, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including October 30, 1962 (R. 311). The petition was filed on November 16, 1962,¹ and granted on

¹The government in its brief in opposition raised no issue as to timeliness, since the late filing was apparently due to a misunderstanding between petitioner and prison authorities.

May 27, 1963 (R. 312; 373 U.S. 931). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The police of Newport, Kentucky, arrested petitioner and his co-defendants. Shortly thereafter, they conducted a search of the automobile in which the men were apprehended. The following facts were known to the police at the time of the arrest: that petitioners had been seated in a stationary automobile on a city street from 10:00 p.m. to 3:00 a.m.; that they offered an implausible explanation of their conduct; that they had no papers indicating ownership of the vehicle; and that one of them claimed that he had bought the automobile on the preceding day, although all of them acknowledged that they were unemployed. The following questions are presented:

1. Whether in the circumstances the search of the automobile (which showed that the men possessed loaded pistols and objects suitable for use in the commission of robbery) was unreasonable and therefore in violation of the Fourteenth Amendment.
2. Whether it was plain error to appoint two lawyers to represent three defendants jointly.*

STATUTES INVOLVED

Ordinance No. 1320 of the City of Newport, Kentucky, provides:

SECTION 1. Loitering—Penalty: That it shall be unlawful for any person not having a legit-

* This question was not presented as an issue in the petition for a writ of certiorari.

imate business or visible means of support to, in an idle, dissolute, disreputable or loafing way, to loiter around the streets or within the limits of the City of Newport and any person so offending shall be, on conviction thereof, fined in any sum not exceeding fifteen dollars and costs.

Kentucky Revised Statutes § 436.520 provides in pertinent part:

Vagrancy. (1) Any person guilty of being a vagrant shall, for the first offense, be fined ten dollars or imprisoned for thirty days, or both. For the second and each subsequent offense, he shall be imprisoned for sixty days.

(2) "Vagrant," as used in subsection (1) of of this section * * * means:

(a) Any able-bodied male person who habitually loiters or rambles about without means to support himself, and who has no occupation at which to earn an honest livelihood; or

(b) Any able-bodied male person without visible means of support who habitually fails to engage in honest labor for his own support or for the support of his family, if he has one, or

(d) Any able-bodied person without visible means of support who habitually refuses to work, and who habitually loiters on the streets or public places of any city.

STATEMENT

Petitioner and two others were convicted in the United States District Court for the Eastern District of Kentucky of conspiring to rob a federally insured

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state bank (R. 1-2, 295). Petitioner was sentenced to imprisonment for five years (R. 299).

The principal issue relates to the seizure from an automobile by Newport, Kentucky, police of objects suitable for use in the commission of robberies, including two loaded pistols, a mask, rope, and a false license plate with hooks which would allow it to be hung over another license plate. Petitioner and his co-defendants moved to suppress as evidence the objects seized from the automobile on the ground that they were "illegally obtained as a result of an unreasonable search and seizure, in violation of the constitutional rights of defendants" (R. 2-3). They argued they were "entitled to a judicial determination by the Commonwealth of Kentucky as to whether or not they were unlawfully or lawfully arrested and upon that determination hinges the question of whether this was or was not an unlawful search and seizure in violation of their Constitutional rights" (R. 168-170, 253). After a hearing (R. 7-26), and again at the close of the government's case and at the conclusion of the trial (R. 170-171, 254), the trial court denied the motion. It held that the state police officers who seized the objects had made a reasonable search.

The circumstances which the court found warranted the search were these: at 3:00 a.m., petitioner and his two companions were seated in a stationary automobile parked in a business section; they had been there for five hours; they could give no reasonable explanation for their conduct; they gave "illogical or

*The fourth defendant charged in the indictment, who is a fugitive, was not in the automobile.

rather vague and irresponsible, and suspicious reasons for why they were there present," and they did not possess the title papers to the automobile. These circumstances, the court found, justified the arrest for vagrancy and the resulting search (R. 26-27, 170-171, 254). The court of appeals affirmed (R. 302-308; 305 F. 2d 172). It rejected petitioner's argument, based upon Kentucky law, "that until the legality of the search is determined in the state courts, the evidence is not admissible in this type of prosecution" (Def. Br., Ct. App., p. 5).

The seized evidence was introduced at the trial by the government. Petitioner alone sought review in this Court. The evidence pertinent to the search and seizure may be summarized as follows:

On January 20, 1961, the Newport, Kentucky, police received a complaint at 3 a.m. that three men were acting "suspiciously" in a pale green 1955 Buick automobile at the northeastern corner of Tenth and Monmouth Street. They were told that the men had been parked there since 10 p.m. (R. 9, 19, 21-22, 40).² Two police officers and two detectives were dispatched to investigate (R. 7, 34). The businesses located in the vicinity of the parked car included a filling station, a cigar store, a cafe, a dry cleaning plant, a butcher store, and a night club (R. 18). The officers found petitioner and two others in the automobile. The three men admitted that they had been "in the vicinity for sometime" (R. 9). When the officers asked why they were parked there, the occupants of the car gave a vague explanation for their presence (R. 35). Eventually one of them stated they

were waiting for a truck being driven by one Johnny Sexton from Lexington to Newport on Route 27 (R. 9-10, 14-15). They were unable to specify the company for which Sexton worked, the type of truck that he was driving, or the expected time of his arrival (R. 9, 16).

The officers inquired as to the ownership of the Buick automobile. Sykes said that he had bought the car the previous day but he could not produce any papers evidencing ownership (R. 17, 22, 41). Sykes was asked how the truck driver could identify a newly purchased automobile. He responded that the truck driver usually stopped for coffee at a restaurant on the next corner. Sykes could give no explanation why his automobile was parked at a distance from the restaurant (R. 35). Upon questioning the occupants about their employment, the officers learned that they were unemployed (R. 16-17). Sykes also told the officers that he had been arrested once for breaking and entering a storehouse (R. 42). The officers considered the answers to their questions evasive (R. 16).

The three occupants were arrested for vagrancy and were found to have twenty-five cents among them (R. 16, 22). The automobile was driven by one of the officers to the police station, eight blocks away (R. 8, 12-13). The two uniformed police took the arrested men to the station in their police car (R. 13).

*The distance from Lexington to Newport is less than 100 miles.

At the station, petitioner and his companions were "booked" on a vagrancy charge and required to give their personal effects to a police sergeant. Some fifteen minutes after they were brought to the station, Sykes requested permission to go to the car and get some cigarettes. Permission was refused but Detective Ciafardini and Officers Colston and Dotson went to the automobile. Ciafardini, who had the keys to the car, saw no cigarettes either on the seat or on the dashboard. He opened the unlocked glove compartment and found two loaded revolvers (R. 10, 15, 23-24, 35-36, 42-43, 60-61, 64). The officers then attempted to open the locked trunk of the car, but the key would not work (R. 15, 24, 44, 62, 64). They returned to the station and placed an additional charge of carrying concealed and deadly weapons against the defendants (R. 16-17, 23, 36, 52). Detective Ciafardini summoned Sykes for questioning and sent officer Dotson back to the automobile to examine its trunk. Dotson, with the assistance of a garage employee, obtained access to the trunk by removing the rear seat (R. 15, 24, 44, 61-62, 64, 66). Two pillow cases found in the trunk contained two knotted lady's stockings, one with mouth and eye holes and a band-aid for the nose; an illegally manufactured license plate for Mason County, Kentucky, with attached small hooks which permitted it to be hung over another license plate; four caps, two of which had been cut so that they could be pulled further down on the head; two pairs

of gloves; two pieces of rope and a length of fishing cord; five band-aids; and two shot-gun shells (R. 20, 36-37, 44-47, 62, 70).

SUMMARY OF ARGUMENT

I

The basic question in this case is whether the search conducted by state officers of the automobile in which the three defendants were arrested was reasonable under the Fourth Amendment. See *Elkins v. United States*, 364 U.S. 206; *Ker v. California*, 374 U.S. 23.

A. The search of the automobile was reasonable since the state officers could arrest the defendants for the misdemeanor of vagrancy being committed in their presence and could conduct a search incident to the arrests.

1. The record is not clear, because it was not an issue below, whether the arrests were made under authority of the Newport city ordinance or the Kentucky statute, or both. Since the burden of proof was on petitioners, the government can rely upon either provision. The conduct of petitioner and his companions, we submit, is covered by the ordinance which makes it an offense to loiter in an idle way around the streets without having a legitimate business or without visible means of support. Under Kentucky law, an arrest could properly be made by the officers for this violation since it was a public offense committed in their presence.

The Newport ordinance is not unconstitutionally vague. Similar laws have been repeatedly upheld

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against that contention. In any event, this case does not involve the constitutionality of the ordinance. The issue, rather, is whether the police made an arbitrary invasion of privacy. Since, at the least, the ordinance is not patently unconstitutional, the police were not acting arbitrarily when they arrested the three defendants under it for offenses committed in their presence, whether or not a court might later uphold its constitutionality.

2. The search of the automobile, incident to the arrest for vagrancy, was proper. The vagrancy ordinance is intended to prevent persons from lying in wait on the city streets to commit other crimes. We suggest, therefore, though the point is not free from doubt, that the officers could reasonably search for contraband, fruits, and instrumentalities of crimes closely related to vagrancy—offenses such as robbery and assault—which this legislation was designed to prevent.

The search of the automobile at the police station, rather than the place where the car was parked, does not affect its validity. If there was a right to search, there was a right to search at a safe and suitable place. It was therefore reasonable for the arresting officers to conduct the search in a sheltered, lighted area without the necessity of watching three men on the street in the dark of a winter night.

B. 1. Assuming that the officers could not properly have made the arrest for vagrancy, the arrests may be sustained on the ground that the officers had information establishing probable cause for automobile theft. When arresting officers in fact have

probable cause to conclude that one crime is committed, the arrest does not become illegal because they arrest for a different offense. Just as a subjective belief of the officers that probable cause exists cannot justify an arrest where there is no objective probable cause, their subjective intent to arrest for one offense rather than another does not vitiate an arrest when there is probable cause to arrest for the latter.

2. There was probable cause to believe that the defendants had stolen an automobile. The state officers had been summoned at 3:00 a.m. because of apprehension arising from the fact that three men had been seated in an automobile for five hours in a business district. When asked to explain their conduct, the men gave the officers evasive answers. The officers ascertained that the men had no title papers to the automobile and apparently did not have the means to have recently purchased the automobile, as they claimed. Under all the circumstances, "a man of reasonable caution" (*Draper v. United States*, 358 U.S. 307, 313) could believe that the three occupants of the automobile had stolen it.

3. If the defendants could have been validly arrested for auto theft, the search of the automobile and seizure of the items found in it were valid. Arresting officers may seize, incident to an arrest, fruits of the crime, such as stolen property. Therefore, they could seize the automobile and subsequently move, inventory, and examine it.

C. Independent of the validity of the arrests, the officers could search and seize the automobile because they had probable cause to believe that it had been

stolen. It is well established that a vehicle may be searched without a warrant or previous arrest when officers have probable cause to believe that it contains contraband. *Carroll v. United States*, 267 U.S. 132. It follows that an automobile may likewise be seized and searched when the officers have probable cause to believe that the automobile itself is stolen.

II

Petitioner contends that the appointment of two lawyers to represent the three defendants was erroneous. Since petitioner did not raise this argument in the trial court or at any other time prior to his brief on the merits, he must show exceptional circumstances requiring this Court to rectify plain error. There is nothing inherently undesirable in one lawyer's representing multiple defendants as opposed to separate representation for each defendant. The choice is dependent upon trial strategy and the relationship between the defendants. In the absence of any hint that petitioner or his lawyers complained on this ground, there is no basis for concluding that he was improperly represented.

ARGUMENT

I

THE EVIDENCE WAS ADMISSIBLE SINCE THE SEARCH WAS REASONABLE UNDER THE FOURTEENTH AMENDMENT

Petitioner's principal contention is that the introduction at his federal trial of evidence found by police officers in the automobile was reversible error because the search was unconstitutional under the

Fourteenth Amendment.* This Court held in *Elkins v. United States*, 364 U.S. 206, 223, that the test for determining the admissibility, in a federal trial, of evidence obtained by state officials is whether, if the search had been conducted by federal officers, it "would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment * * *." The Court went on to state that "[i]n determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.* at 224.

This test was not changed by *Mapp v. Ohio*, 367 U.S. 643, or *Ker v. California*, 374 U.S. 23. Those cases held that, when a search by state officers violated the Fourteenth Amendment, as judged by the standards applicable to federal officers under the Fourth Amendment, evidence seized could not be admitted at a state trial. In *Ker* the Court also stated (374 U.S. at 33-34):

This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean

* Petitioner has raised no contention as to the sufficiency of the evidence in this Court. The Solicitor General has had some concern on this score but has concluded that the case against petitioner was sufficient to warrant its submission to the jury.

application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. * * * The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation and law enforcement' in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain.

Hence the constitutional standard—reasonableness—must be applied in the broad perspective of adjudication governing all law enforcement officers and all courts, federal and State, throughout the nation.

The situation confronting the arresting officers was that they had received a complaint that three men had been sitting in an automobile on a street from 10 p.m. to 3 p.m. When questioned by the police before their arrest, the men gave evasive and unlikely answers as to the reason for their presence. They said that they were waiting for a truck driver but could not say how they would recognize the truck or how the truck driver would recognize the automobile. They could not name the company for whom the driver worked, the kind of truck he was driving, or the expected time of arrival. While one of the occupants claimed that he had bought the automobile the previous day, he, like the

other two, admitted to being unemployed and he had no title papers.

The local police officers confronted with this situation believed an arrest and a search to be appropriate. The district court, which saw and heard the witnesses and was in all respects closer to the living events than a cold record can bring a reviewing court, found the search to be reasonable. The court of appeals affirmed after a full review. On the bare record the case is close but under all the circumstances the government urges that the findings of reasonableness should be affirmed. *First*, the officers had probable cause to believe that the defendants had violated a local "vagrancy" ordinance and therefore could arrest them for this offense. Incident to the arrest, we argue, they could search for instrumentalities and fruits of related offenses which they could reasonably believe the defendants had committed. *Second*, the arrests were valid because the officers had probable cause to believe that the defendants had stolen the automobile in which they were sitting. Incident to such arrest, they could seize and search the automobile as the fruit of the crime. *Third*, independent of the arrests, the officers had reasonable cause to believe the automobile had been stolen and could therefore search and seize it.

A. THE SEARCH WAS REASONABLE SINCE THE STATE OFFICERS COULD ARREST THE DEFENDANTS FOR THE MISDEMEANOR OF VAGRANCY BEING COMMITTED IN THEIR PRESENCE AND COULD SEARCH THE AUTOMOBILE INCIDENT TO THE ARRESTS

1. The officers could properly arrest the defendants under a
Newport city ordinance for vagrancy

a. The three occupants of the automobile were ar-

rested and booked by officers of the Newport police for "vagrancy." The record is not clear, because the question was not in issue below, whether the arrest was made under a Kentucky statute or a Newport city ordinance. Since a charge of carrying concealed weapons was lodged fifteen minutes after the arrest, when the search uncovered weapons in the car, there was no occasion to show, at the preliminary hearing in the local court, whether one or both provisions had been relied upon by the arresting officers. Both the statute and the ordinance prohibit vagrancy. While the ordinance, unlike the statute, is labelled a loitering provision, it applies to loitering by "any person not having a legitimate business or visible means of support" (see pp. 2-3 above) and describes the kind of conduct embraced by the concept of vagrancy. See, e.g., *State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; *Ex parte Strittmatter*, 58 Tex. Crim. Rep. 156, 124 S.W. 906; D.C. Code § 22-3302; Calif. Penal Code § 647; 3 Wharton, *Criminal Law and Procedure* (Anderson ed.), § 956, pp. 99-101. Indeed, two of the four subsections of the state vagrancy statute require, like the city ordinance, proof of loitering, as well as of lack of visible means of support, for conviction. Therefore the ordinance and the two subsections of the state statute cover essentially the same area and "vagrancy" is an apt description of both.

Since both the state statute and local ordinance prohibit vagrancy, we submit that the arrest was valid if the officers could properly have made the arrests under either provision. As we will show below (pp. 27-29), it is immaterial whether they had the state

statute or the ordinance in mind.* But, even if their subjective intent is deemed to be controlling here, the only evidence is consistent with an arrest for violation of both provisions. The burden of proof is on the one challenging the legality of a search and seizure to show that an illegal search and seizure has occurred. *Lotto v. United States*, 157 F. 2d 623, 626 (C.A. 8), certiorari denied, 330 U.S. 811; *Schnittzer v. United States*, 77 F. 2d 233, 235 (C.A. 8); cf. *Nardone v. United States*, 308 U.S. 338, 341. Petitioner having failed even to raise the issue (see R. 168-169), let alone present any evidence, as to the provision under which the arrests were made, has failed to sustain his burden of proving that the arrests were not under both provisions but were rather pursuant to one and not the other. Consequently, the arrests were valid if the officers had power to arrest under either provision.

The power of local police officers to make an arrest is determined by local law even in cases involving the federal constitutionality of a search. *Ker v. California*, 374 U.S. 23; *United States v. Di Re*, 332 U.S. 581. Under Kentucky law, a peace officer may arrest without a warrant when a public offense is committed in his presence or when he has reasonable grounds for believing that the person arrested has committed a felony. Kentucky Criminal Code of Practice, § 36 (now replaced by Ky. Rev. Stat. § 431.005). The term "public offenses" includes "any acts or omis-

* We show below that the arrest would be valid under the ordinance even if petitioner had shown that the subjective intent of the officers was to arrest under the state statute. It is sufficient that the officers had grounds to arrest regardless of the statute on which they happened to rely.

sions for which the law has prescribed a punishment" (*Stratton v. Commonwealth*, 263 S.W. 2d 99, 100 (Ky.); it is not limited to felonies. The arrest statute has been construed by the Kentucky Court of Appeals to authorize arrest if the officer acts in good faith and upon reasonable grounds to believe that a public offense is being committed in his presence. *Sizemore v. Hoskins*, 314 Ky. 436, 235 S.W. 2d 1011. While that belief must come to an officer through his senses, information received from the person arrested is considered as within the presence of the officer. In *Giannini v. Garland*, 296 Ky. 361, 367, 177 S.W. 2d 133, the court, in explaining most of the arrest cases cited by petitioner (Pet. Br. 26-27), said: "[A]n officer may arrest a misdemeanor without a warrant upon the ground that the offense was committed in his presence when he has 'reasonable grounds to believe, and did believe in good faith' that the person arrested was guilty, but the foundation for such reasonable belief must be based and deduced from facts obtained by the officer through some one or more of his senses and not from information he may have received from third parties. But information received from the person arrested is sufficient to complete the commission of the offense in the presence of the officer." See also *Davis v. Commonwealth*, 280 S.W. 2d 714 (Ky.).

The state statute (see p. 3 above) makes it a criminal offense if any person, without visible means of support, "habitually loiters or rambles about" and has no occupation, or "habitually fails to engage in honest labor for his own support or for the support of his family," or "habitually refuses to work, and * * *

habitually loiters on the streets or public places."

The officers here knew that the three occupants of the automobile were loitering since they had been told that the men had been there for five hours late at night. The officers also knew that the men had no means of support or occupation since the men said that they were unemployed. However, they apparently had no indication that the men "habitually" loitered or "habitually" refused or failed to work. Consequently, we do not urge that the officers could reasonably believe that the state statute was being violated in their presence.

But it does appear that the local officers had power under Kentucky law, and therefore consistently with the Fourth and Fourteenth Amendments, to arrest for violation of the city ordinance. The ordinance prohibits loitering in an idle way "around the streets or within the limits of the City of Newport" by "any person not having a legitimate business or visible means of support." The officers saw three men in a parked car on the streets of Newport at 3 a.m. The men admitted to the officers that they had been there for some time,* that they were unemployed, and that they had no title papers to the car. They gave an implausible explanation of why they were there. The

* In our brief in opposition to the petition for a writ of certiorari in this case, we indicated, without a detailed analysis of the evidence in relation to the state statute, that the officers did have probable cause to arrest under it. The respondent can of course make new arguments in support of the judgment in its favor below.

* The admission of the men that they had been present for some time was supported by the complaint made to the police that they had been there for five hours.

officers therefore had reasonable grounds, based on information obtained by their senses, to believe that the defendants were violating the ordinance in their presence. Cf. *State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; *People v. Bruno*, 211 Cal. App. 2d 855.*

b. Petitioner contends (Br. 34-41) that the arrests were invalid because the state vagrancy statute was unconstitutionally vague. In particular, he claims that the words "loiters" and "without visible means of support" do not indicate what is prohibited and what is not. Since these are likewise elements of the crime under the city ordinance, petitioner's argument as to vagueness is applicable to the ordinance as well.¹⁰

Petitioner's argument is that a prohibition against loitering by persons without visible means of support

* Petitioner contends (Pet. Br. 30-32) that the defendants were not arrested for vagrancy despite the explicit testimony that they were arrested and booked for this crime (R. 15). He relies on the testimony of an arresting officer that the defendants "[w]ere up for no good" (R. 18) and the characterization by the courts below of the defendants' conduct as suspicious (R. 26, 170, 304). However, the ordinance prohibits only loitering "in an idle, dissolute, disreputable or loafing way." Thus, ordinary standing or sitting is not prohibited; loitering in a suspicious manner, on the other hand, satisfied this element of the crime.

¹⁰ Petitioner also contends (Pet. Br. 40-41) that the state statute violates "the Eighth Amendment's ban on cruel and unusual punishment as made applicable through the Fourteenth Amendment" because it punishes the mere status of being a pauper. This argument is not, unlike his vagueness claim, applicable to the city ordinance. The ordinance does not punish being a pauper; a person without "a legitimate business or visible means of support" must also commit the act of loitering "in an idle, dissolute, disreputable or loafing way."

results in ambiguity as to whether certain kinds of conduct are covered by the statute. Assuming that this is true, this Court has held that "if the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague * * *. And if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." *United States v. Harriss*, 347 U.S. 612, 618; accord, *United States v. Petrillo*, 332 U.S. 1, 7; *Robinson v. United States*, 324 U.S. 282, 285-286; *United States v. Wurzbach*, 280 U.S. 396, 399; cf. *Jordan v. De George*, 341 U.S. 223, 231. The ordinance involved here is plainly aimed at persons who, having no employment or legal source of income, remain on the streets without any valid reason for their presence.¹¹

The defendants' conduct in this case was the kind of conduct at the heart of the ordinance no matter how narrowly it might be read. The defendants had been sitting in an automobile for five hours late at night. They all admitted that they were unemployed. They had no reasonable explanation for their presence. Therefore, whether or not other persons in other situations might be uncertain as to the lawfulness of their conduct under this ordinance, the ordinance clearly

¹¹ From an early time the night-walker or prowler has been a cause for concern. See 2 Hale, *Pleas of the Crown* (1st American ed., 1847) 96; 2 Hawkins, *Pleas of the Crown* (6th ed., 1777), c. 12, § 20; 4 Blackstone, *Commentaries* (Lewis ed., 1900) 292; Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541, 704-705. It makes no difference that the defendants were apparently sitting in wait rather than walking.

covered the defendants' conduct and was constitutional as applied to them.

Moreover, the crime of vagrancy, with essentially the same elements as those in the ordinance involved here, is of ancient origin. Such laws appeared in crude form in Ireland in the fifth century and in England in the seventh century. Ribton-Turner, *A History of Vagrants and Vagrancy* (1887), 5, 374-375. Today, such laws exist in almost all Anglo-American jurisdictions. They have been repeatedly upheld by the courts against contentions that they were unconstitutionally vague. *E.g.*, *Adamson v. Hoblitzell*, 279 S.W. 2d 759 (Ky.); *Ex parte Strittmatter*, 58 Tex. Crim. Rep. 156, 124 S.W. 906; *City of Columbus v. McCrory*, 49 N.E. 2d 583 (Ohio); *Dominguez v. City and County of Denver*, 363 P. 2d 661 (Colo.); see *State v. Grenz*, 26 Wash. 2d 764, 175 P. 2d 633; 9 A.L.R. 1366; 111 A.L.R. 68.¹²

¹² Of the state and territorial cases cited by petitioner (Bt. 35-36, note 25) holding vagrancy statutes unconstitutional only *Territory of Hawaii v. Anduha*, 31 Haw. 459, affirmed, 48 F. 2d 171 (C.A. 9), and *City of St. Louis v. Gloner*, 210 Mo. 502, 109 S.W. 30, involve provisions in any way analogous to that involved here. And in those cases the conduct involved did not, as here, occur late at night under circumstances indicating that those loitering were a danger to the public.

Petitioner also cites (Pet. Br. 36-37) *Lanzetta v. New Jersey*, 306 U.S. 451, and Mr. Justice Black's opinion dissenting on other grounds in *Edelman v. California*, 344 U.S. 357. In those cases, however, the statutes, while loosely grouped under the heading of vagrancy, were entirely different and more ambiguous than that in this case. They applied to any person "known to be a member of any gang" and a "dissolute person," respectively. Moreover, in *Lanzetta*, the Court made clear that it was dealing with "a new offense," not one existing for centuries. 306 U.S. at 453. See *id.* at 455.

In any event, this case does not involve the constitutionality of the Newport ordinance. The issue is whether the police acted arbitrarily. Surely, they are not acting arbitrarily in making an arrest when an offense is committed in their presence under an existing ordinance whether or not a court might later uphold its constitutionality. The police are ministerial officers rather than judicial officers; their job is not to expound statutes but to act under them. Cf. *Miller v. Stinnett*, 257 F. 2d 910 (C.A. 10).

Conceivably, an arrest would be invalid if it was based on a statute which was patently unconstitutional. In those circumstances, officers may perhaps fairly be charged with knowing that no offense was actually being committed in their presence. Here, however, even if the ordinance is vague in its outer contours, it appears to cover the very circumstances confronting the officers. Moreover, the ordinance is, at the least, not patently unconstitutional. Cf. Model Penal Code, § 250.6. As we have seen, it is the descendant of laws which have existed for centuries, and similar statutes have been repeatedly sustained. Indeed, the Kentucky Court of Appeals has held that the analogous state statute (see p. 17 above) is not void for vagueness. *Adamson v. Hoblitzell*, 279 S.W. 2d 759. When the highest court of the State has ruled that a similar vagrancy statute is not void for vagueness, it is not the function of the police to question that judgment.

2. *The search was proper as incident to a valid arrest*

It is well established that officers may, incident to a valid arrest, search the person arrested and the surrounding premises "to find and seize things connected with the crime," including instrumentalities of the crime, fruits of the crime, contraband, and weapons. *Agnello v. United States*, 269 U.S. 20, 30; accord, e.g., *Carroll v. United States*, 267 U.S. 132, 158; *Weeks v. United States*, 232 U.S. 383, 392. If the officers happen to find items related to another crime during such a search, they need not ignore them. *Harris v. United States*, 331 U.S. 145, 153-155.

The crime of vagrancy is closely related to other crimes and vagrancy statutes have been historically used to protect the community against persons whose only means of support was illegal. See 3 Wharton, *Criminal Law and Procedure* (Anderson ed.), § 956, p. 99. It is apparent that the Newport ordinance, like the state statute, is intended to prevent such persons from lying in wait on the city streets to commit such crimes as assault and robbery on passers-by. Assuming that the officers here did not have probable cause to believe that the defendants had committed any other crimes (but see pp. 29-34 below as to auto theft), they could reasonably suspect that the occupants of the car had committed, or were soon likely to commit, other crimes. The three men claimed that one of them had just bought an automobile although they admitted that they were unemployed and had no title papers. Furthermore, their unlikely and evasive explanation of their pres-

ence late at night while parked for five hours made it appear that they were lying in wait. We suggest, although the point is not free from doubt, that, having made a valid arrest for vagrancy, the officers could search for instrumentalities and fruits of closely related crimes, such as assault and robbery. This is not, of course, to argue that officers are free to conduct a general search whenever they make a valid arrest."

It is irrelevant that the search was delayed fifteen minutes until the automobile had been moved to a garage near police headquarters. If the right to search the car existed at all, it included the right to search at a safe and suitable place. The criterion of reasonableness allows flexibility in procedures. Arresting officers with reason to suspect that an automobile has been stolen have the right to remove an automobile to the police station and search it in a sheltered, lighted area without the necessity of watching three men on the street late on a winter night.

This view is amply supported by decisions of this Court and the lower federal courts. — In *Abel v. United States*, 362 U.S. 217, 239, this Court suggested that, if a search may be conducted at the place of arrest, it may be conducted at the first place of detention.¹⁴ In *Fraker v. United States*, 294 F. 2d 859 (C.A. 9), a defendant arrested for robbery was booked

¹⁴ While a search cannot be justified by what is found (see pp. 33-34 below), it is interesting that the automobile did in fact contain both weapons and instrumentalities of robbery.

¹⁵ The defendant there had, however, chosen to take the property with him.

at the station and his car was taken to a nearby garage. A search of his automobile one hour and a half after his arrest was found to be reasonable. Accord, *Bartlett v. United States*, 232 F. 2d 135 (C.A. 5); *United States v. Fortier*, 207 F. Supp. 516 (D. Conn.); *State v. Mpetas*, 79 N.J. Super. 202, 191 A. 2d 186, 189; cf. *Scher v. United States*, 305 U.S. 251."

Petitioner contends (Pet. Br. 49-51), that the officers had time to get a search warrant after they arrested the three defendants and therefore the search incident to the arrest was unreasonable. As he himself admits, *United States v. Rabinowitz*, 339 U.S. 56,

"*Weeks v. United States*, 232 U.S. 383, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, and *Agnello v. United States*, 269 U.S. 20, which are relied upon by petitioner (Pet. Br. 48), are not in point as to this issue. In each of those cases the search was of a place not under the immediate control of the person arrested at the time of the arrest. We do not contend that when a person is arrested in his home a search can later be conducted of his office. Instead, our contention is that, if a person is arrested in his automobile, it can be moved and searched for purposes of convenience a few minutes later.

The court of appeals cases relied on by petitioner (Pet. Br. 51-52) are likewise inapposite. In *Rent v. United States*, 209 F. 2d 893 (C.A. 5), the search occurred more than nine hours after the arrest. While the search occurred only five minutes after the formal arrest in *United States v. Stoffey*, 279 F. 2d 924 (C.A. 7), the court of appeals emphasized that the defendant had been in the control of the police for three hours and that the defendant had not been arrested in his automobile. In *Shurman v. United States*, 219 F. 2d 282 (C.A. 5) certiorari denied, 349 U.S. 921, the time between the arrest and search is not stated. The search and seizure in *Weaver v. United States*, 295 F. 2d 360 (C.A. 5), was invalid on other grounds since the search immediately followed the arrest. In *Mosco v. United States*, 301 F. 2d 180 (C.A. 9), and *Clay v. United States*, 239 F. 2d 196 (C.A. 5), the searches preceded the arrests.

overruled the holding in *Trupiano v. United States*, 334 U.S. 699, that a search without a warrant which is incident to a valid arrest is invalid if the officers had time to obtain a search warrant. However, petitioner contends that, even under *Rabinowitz*, this is one factor to be considered in determining reasonableness. Even if petitioner's legal position is correct, the officers did not have time to obtain a warrant at the time the arrest was made. This was the crucial time since the officers had no right to move the automobile unless they could, contrary to petitioner's position, either seize or search it. Four officers made the arrest. Under petitioner's argument, one would have had to obtain a search warrant—assuming that one could have been obtained at 3:00 a.m.—leaving only one to guard the automobile and two officers to take the three arrested men to police headquarters. If the automobile had been left unattended, a possible confederate (one in fact existed) could have moved it. It was reasonable for the officers to refuse to divide up late at night and thereby to endanger themselves, the effectuation of the arrests, and the search of the automobile. Since the officers in *Rabinowitz*¹⁸ could just as easily have obtained a search warrant, this Court's holding that the search without a warrant incident to that arrest was valid is controlling here.

¹⁸ Three government agents, accompanied by an Assistant United States Attorney and two other persons, made the arrest in *Rabinowitz*.

B. THE SEARCH WAS REASONABLE SINCE THE STATE OFFICERS HAD PROBABLE CAUSE TO ARREST THE DEFENDANTS FOR AUTOMOBILE THEFT AND TO SEIZE THE AUTOMOBILE AS THE FRUIT OF THE CRIME

1. The defendants' arrests were valid if the officers had probable cause to believe that they had committed automobile theft even though they were arrested for another crime

The defendants in this case were arrested and booked for "vagrancy." We submit that, even assuming that the officers could not properly have made the arrests for this crime, the arrests were still valid if the officers had probable cause to conclude that another crime had been committed. For it is clear that an arrest may be upheld on a theory which was not in the minds of the arresting officers.

This Court has held that, even if the warrant upon which an arrest is based is invalid, nevertheless the arrest is valid if the arresting officers had probable cause to believe that the suspect committed the offense charged in the warrant. *Stallings v. Splain*, 253 U.S. 339, 342; *United States v. Rabinowitz*, 339 U.S. 56, 60; cf. *Marron v. United States*, 275 U.S. 192. See also *United States v. Gowen*, 40 F. 2d 593, 595 (C.A. 2), reversed on other grounds *sub. nom. Go-Bart Importing Co. v. United States*, 282 U.S. 344; *United States v. Chin On*, 297 Fed. 531, 533 (D. Mass.). Moreover, in *United States v. Rabinowitz*, the Court indicated that, regardless of whether the arrest warrant was sufficient, an arrest was valid if the arresting officers had probable cause to believe that the suspect had committed an offense in their presence, even though that offense was not the same as that charged in the

warrant. After the Court first stated that the warrant was, as far "as can be ascertained, broad enough to cover the crime of possession" of forged and altered postage stamps, it went on to say that, even if the warrant did not cover that offense, "the arrest therefor was valid because the officers had probable cause to believe that [this] felony was being committed in their very presence." 339 U.S. at 60."

Under the principle stated in *Rabinowitz*, the arrests of the three defendants were valid if the arresting officers had, at that time, information establishing probable cause in relation to another crime, even though they in fact intended to arrest the defendants for vagrancy. Lawyers and even judges have difficulty in applying the general standards of probable cause to specific fact situations. It is therefore not surprising that police officers sometimes make mistakes when, impelled by the need to act, they are forced to decide quickly whether they have probable cause. When it is later found by a court that they made a mistake because they did not in fact have probable cause, the arrest is properly held to be illegal. On the other hand, when the arresting officers in fact had probable cause to conclude that one crime had been committed, it would make little sense to hold that the arrest is illegal because they had a different offense in mind. Just as a subjective, good-faith belief of the arresting officers that probable cause exists cannot justify an arrest when there is no objective

¹⁷ Later decisions of this Court have questioned *Rabinowitz* (see Pet. Br. 24), but entirely on other grounds.

probable cause, the subjective belief of the arresting officers that they are arresting for one offense rather than another cannot vitiate an arrest when objectively they had probable cause to conclude that the suspects had committed a crime. To hold otherwise would not protect anyone from arrest on mere suspicion—the interest which the Fourth Amendment was designed to protect. It would merely penalize the government—in reality the public—when arresting officers, having several possible grounds on which to arrest a suspect, happen to choose an invalid rather than a valid ground.

2. *The arresting officers in fact had probable cause to conclude that the defendants had committed the felony of automobile theft.*

Kentucky law provides that “[a]ny person who unlawfully takes, drives or operates a vehicle without the knowledge or consent of the owner” is guilty of a felony. 1953 Ky. Rev. Stat. § 433.220. This Court has held that “[p]robable cause exists where ‘the facts and circumstances within [the arresting officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that’ an offense has been or is being committed.” *Draper v. United States*, 358 U.S. 307, 313. Earlier, this Court held in *Brinegar v. United States*, 338 U.S. 160, 175–176, that:

In dealing with probable cause . . . , as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life

on which reasonable and prudent men, not legal technicians, act. * * *

* * * Because many situations which confront officers in the course of executing their duties are, more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.

The government submits that the arresting officers had, under this criterion, a reasonable basis for believing that the defendants had probably taken the automobile in which they were sitting without the consent of the owner.

Four officers of the Newport police force, responding to a complaint, went at 3 a.m. to investigate three men who had been seated in an automobile in the business district for five hours on a winter night. There is no valid basis to contest, and petitioner does not deny, the right of the officers to question the occupants of the automobile. See, e.g., *Rios v. United States*, 364 U.S. 253; *Busby v. United States*, 296 F. 2d 328, 331 (C.A. 9); *Gisske v. Sanders*, 9 Cal. App. 13, 16-17, 98 Pac. 43; *People v. Simon*, 45 Cal. 2d 645, 290 P. 2d 531; *People v. West*, 144 Cal. App. 2d 214, 300 P. 2d 729. The officers sought to ascertain the reason for this unusual conduct. The answers of the men were at first vague and evasive. After some hesitation, Sykes, the driver, claimed that they were waiting for a truck driver, Johnny Sexton, but Sykes was unable to state how he was going to recognize the truck or how the driver would be able to recognize the automobile. The men could not name

the company for which Sexton worked, the kind of truck he was driving, or the expected time of his arrival. There was no reason given why they had waited so long for a truck supposedly being driven from Lexington to Newport, a distance of less than 100 miles.

When the officers inquired as to the ownership of the Buick automobile, Sykes said that he had bought the car the previous day. However, Sykes did not have any papers evidencing ownership, although Kentucky law requires that a car must be registered before it can be operated and a registration receipt must be kept in the owner's possession at all times. Ky. Rev. Stat. §§ 186.020, 186.170. The officers inquired how the truck driver would recognize a newly purchased automobile. Sykes answered that the truck driver usually stopped for coffee at a restaurant at the next corner; he could not explain, however, why the men were parked some distance from the restaurant. The three men told the officers that they were unemployed, one saying that he had been unemployed for six months.

In summary, the officers could have reasonably suspected that the three men were engaged in some illegal activity by their mere presence for five hours in a parked car from 10 p.m. to 3 a.m. The men gave highly suspicious reasons for their presence. The officers then questioned them about their ownership of the automobile. The story of Sykes that he had purchased the automobile the day before seemed highly unlikely since, contrary to Kentucky law, he had no registration papers and, like the other two men, he admitted to being unemployed. The officers could

have reasonably doubted the probability that an unemployed man would have either the cash or credit to buy an automobile apparently worth over five hundred dollars." In these circumstances, and considering the evasiveness of the defendants' proffered explanations of their conduct, we submit that "a man of reasonable caution" was warranted in believing that the three occupants of the automobile had stolen it.

It is worth speculating as to what the officers should have done rather than arrest the three defendants. For this Court has made clear that the practical situation confronting law enforcement officers is important in determining whether the standard of probable cause has been met in the circumstances. In *Brinegar*, Mr. Justice Rutledge, speaking for the Court, said (338 U.S. at 176):

These long-prevailing standards [of probable cause] seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. * * * The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice.

²² The National Auto Dealers Used Car Guide valued a 1955 Buick Hardtop as worth between \$525 and \$590 at retail in 1961 depending on the model.

Here, the officers had responded to a complaint of a citizen; they were not making a hit or miss round-up of either pedestrians or motorists on "suspicion." The officers had very strong reasons for believing that the three occupants of the automobile had engaged in auto theft and were about to engage in further crimes. As experienced police officers, they were aware of the fact that the automobile is not just a means of innocent transportation but that it is, especially if stolen, an important tool for the commission of other crimes. The occupants had sat in an automobile for five hours late at night seemingly in wait. They gave the officers an explanation of their presence which was evasive and improbable. As the Court of Appeals for the District of Columbia Circuit posed the issue in similar circumstances in *Bell v. United States*, 254 F. 2d 82, 87, certiorari denied, 358 U.S. 885.

What should the patrolman have done? Forthwith gesture these men on? Or detain them for further inquiry—for investigation of the obviously reasonable suspicion? Clearly his duty required the latter.

As it turned out, the automobile was not stolen. Sykes had in fact purchased it for a total price of \$341.25 the day before (R. 118). On the other hand, Sykes testified that the men were waiting for the former husband of Sykes' wife to come out of a night club so that they could whip him (R. 183-184); by his account, they therefore were guilty of conspiracy to commit assault. In addition, the conviction in this case shows that the three men were also guilty of con-

spiring to rob a federally insured bank. Thus, the men were not guilty of auto theft but were guilty of two other crimes. It is well established that an arrest cannot be justified because it later turns out that the suspects had committed a crime when the officers did not have probable cause at the time of the arrest. *E.g., Henry v. United States*, 361 U.S. 98, 103; *Johnson v. United States*, 333 U.S. 10, 16-17. By the same token, it is immaterial that the suspect is later found not to have committed a crime when the officers had probable cause to believe he had at the time they made the arrest. *Dumbra v. United States*, 268 U.S. 435, 441.

In short, the question is whether the officers had probable cause to believe, at the time of the arrests, that the three occupants of the automobile had committed auto theft. It is irrelevant that evidence subsequently obtained shows that, instead, they were guilty of other crimes. As this Court made clear in *Brinegar*, the standard relates to probabilities; it leaves room for mistakes so long as they are reasonable. Since the officers did have probable cause as to auto theft, the arrests of the three defendants were valid.

3. Incident to the arrest, the officers could seize and search the automobile as the fruit of the crime

We have argued above that the arrests of the three occupants of the automobile were valid. It is well established that, incident to a valid arrest, law enforcement officers may seize "the fruits of crime such as stolen property." *Harris v. United States*,

331 U.S. 145, 154; accord, *Agnello v. United States*, 269 U.S. 20, 30; *Carroll v. United States*, 267 U.S. 132, 158; *Gouled v. United States*, 255 U.S. 298, 309; *Weeks v. United States*, 232 U.S. 383, 392; *Boyd v. United States*, 116 U.S. 616, 623-624. After seizure, property can be moved, inventoried, and thoroughly examined at any time in preparation for use at trial or return to the proper owner. See *United States v. Lee*, 274 U.S. 559, 562.

Having probable cause to arrest the three men for auto theft, the officers could likewise reasonably believe that the automobile in which the occupants were sitting was the fruit of the crime of auto theft. Consequently, the automobile and all that was in it were subject to seizure as stolen property¹⁹ and to being moved to the garage near police headquarters. It is immaterial, from this standpoint, that the automobile was searched some minutes after the arrests, for at that time there was still reason to believe that the automobile had been stolen. The weapons, masks, false license plates, and other paraphernalia of robbery discovered in the automobile could be seized and retained beyond the time the automobile itself was found not to have been stolen since they were instrumentalities of the crime of robbery and are therefore subject to seizure. See *Harris v. United*

¹⁹ Several States have statutes which specifically authorize officers to seize an automobile when the officers have reasonable cause to believe that the vehicle is not in the rightful possession of the owner. See, e.g., Colo. Rev. Stat. § 13-2-17. N.Y. Vehicle and Traffic Law, § 424.3; Utah Code § 41-1-115; Wyo. Stat. § 31-322.

States, 331 U.S. 145, 153-155. In short, if the officers had probable cause to arrest for auto theft, it surely follows that the search of the automobile and seizure of the items found in it were likewise valid.

C. INDEPENDENT OF THE ARRESTS, THE OFFICERS COULD PROPERLY SEARCH AND SEIZE THE AUTOMOBILE BECAUSE THEY HAD PROBABLE CAUSE TO BELIEVE THAT IT HAD BEEN STOLEN

We have urged above that the arrests of the three occupants of the automobile were lawful because the officers had probable cause to arrest for auto theft, and that therefore the search and seizure of the automobile incident to the arrests were valid. This argument turned basically on the validity of the arrests. Here, we contend that, independent of the validity of the arrests, the officers had probable cause to believe the automobile was stolen (see pp. 29-34 above) and could therefore search and/or seize it under principles laid down by this Court.

1. *The officers could search the automobile since they had probable cause to believe that it had been stolen*

In *Carroll v. United States*, 267 U.S. 132, this Court held that officers may search an automobile without a warrant and without previously making an arrest, when they have probable cause to believe that it contains contraband such as stolen goods. Accord, *Husty v. United States*, 282 U.S. 694; *Scher v. United States*, 305 U.S. 251; *Brinegar v. United States*, 338 U.S. 160; *Henry v. United States*, 361 U.S. 98. It follows that an automobile can likewise be searched when it itself is subject to seizure because it is reasonably believed to have been stolen.

In dictum, the Court has suggested that *Carroll* left undecided whether the principle extended beyond a

search for violation of the National Prohibition Act. *United States v. Di Re*, 332 U.S. 581, 584-585. The Court in *Di Re* noted that the legislative history of the Act showed that Congress intended to provide for searches without warrants and that this statute was entitled to a strong presumption of constitutionality. We submit that the *Carroll* decision applies wherever officers have probable cause to believe that the automobile is carrying contraband or that it, itself, is subject to seizure, as when it is stolen. First, the language of the holding in *Carroll* is not confined to searches under the National Prohibition Act. Instead, the Court clearly stated that "[o]n reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid," 267 U.S. at 149; see *id.* at 153. Thus, the Court did not rely on the statute or offense involved; rather, its decision turned on the object to be searched. Since in this case, as in *Carroll*, an automobile was involved, we believe that here too the officers could search on the basis of probable cause.

Second, this Court has applied the holding of *Carroll* beyond cases involving the National Prohibition Act. In *Scher v. United States*, *supra*, and *Brinegar v. United States*, *supra*, the latter decided after *Di Re*, the Court relied on *Carroll* to uphold searches made under the Liquor Taxing Act of 1934 and the Liquor Enforcement Act of 1936. And only a few

terms ago in *Henry v. United States, supra*, the Court again made clear that *Carroll* was applicable to searches for contraband liquor. While all of these cases concerned liquor, the statutes involved were not the National Prohibition Act. Yet, this Court applied *Carroll* without even suggesting that the difference in the statutes or offenses involved was relevant.

There are only two possible distinctions between this case and *Carroll*. First, the automobile searched in this case had admittedly been stationary for five hours. However, in *Scher v. United States, supra*, the principle laid down in *Carroll* was applied to the search of an automobile which had been parked in the suspect's garage immediately before the officers arrived. See *Husty v. United States, supra*, 282 U.S. at 701; *United States v. Walker*, 307 F. 2d 250, 252 (C.A. 4). The automobile here, like any other automobile in working order, was capable of immediate movement. The officers could not be certain whether it would move in seconds or hours. The officers did not have probable cause to believe that it had been stolen until after they had questioned the occupants (see pp. 30-31 above. Once the officers' suspicions were known to the occupants, it was likely that they would drive out of the area or even beyond the jurisdiction before a search warrant could be obtained.²⁰

²⁰ Petitioner states (Pet. Br. 43) that the automobile could not have been moved because it was in the custody of the police. However, this custody was legal only if, as we argue and petitioner denies, the officers could either seize the automobile or could at least move it to a convenient place for search.

Second, the search of the automobile was not made until the automobile was first moved to a garage near police headquarters. As we have argued (pp. 24-25), if a search of an automobile could properly be made on the street, it may be delayed a few minutes and moved a few blocks for purposes of convenience. Such a search does not thereby become unreasonable under the Fourth Amendment.

2. *The officers could properly seize, and subsequently search, the automobiles because they had probable cause to believe that it had been stolen*

It is not necessary, however, to go so far as *Carroll* went in order to sustain the searches in this case. We have seen (pp. 29-34) that the officers had probable cause to believe that the automobile had been stolen. They had reasonable ground to believe that they could seize it as stolen from its proper owner; there was no need to search an automobile which was not itself contraband while looking for contraband. As this Court stated in *Boyd v. United States*, 116 U.S. 616, 623, "[t]he seizure of stolen goods is authorized by the common law." The reason is that the thieves have no right to such goods since "the owner from whom they were stolen is entitled to their possession * * *." *Id.* at 624.²¹ Once the automobile was properly seized as stolen property, it could be moved, inventoried, and searched.

²¹ See also the cases cited above (pp. 34-35), holding that stolen goods may be searched for, and seized, incident to a valid arrest.

II

THE APPOINTMENT OF TWO LAWYERS TO REPRESENT THE THREE DEFENDANTS JOINTLY WAS NOT PLAIN ERROR WARRANTING REVERSAL WHEN RAISED FOR THE FIRST TIME IN THE BRIEF ON THE MERITS IN THIS COURT

Petitioner also contends (Pet. Br. 54-57), relying on *Glasser v. United States*, 315 U.S. 60, that the appointment of two lawyers to represent the three defendants jointly deprived him of the effective assistance of counsel. This issue is not properly here since it was not raised in either of the two courts below and was not presented in the petition for a writ of certiorari. See, e.g., *Lawn v. United States*, 355 U.S. 339, 362, note 16; *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93, 96, note 1; *Irvine v. California*, 347 U.S. 128, 129-130 (plurality opinion of Mr. Justice Jackson); Rule 23(1)(c) of the Rules of this Court. Therefore, petitioner is required to show not merely that the district court committed error or even prejudicial error. Instead, petitioner is required to show "exceptional circumstances" requiring this Court to rectify a "plain error" or error which "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160; accord, e.g., *Silber v. United States*, 370 U.S. 717; *Duignan v. United States*, 274 U.S. 195, 200; Rule 40(1)(d)(2) of the Rules of this Court.

In any event, the district court did not err in appointing two attorneys to represent the three defendants. First, in *Glasser* this Court emphasized that counsel for Glasser had objected to his appoint-

ment by the trial court to represent an additional defendant because of the possibility of conflict between the interests of the two defendants. 315 U.S. at 68, 70, 71. Thus, the Court made clear that the appointment of counsel for co-defendants is erroneous only when one or both defendants is unwilling to be so represented. In this case, there is not even a suggestion in the record that petitioner did not wish to be represented jointly or that his lawyers felt they could not properly represent the co-defendants.

Second, this Court also made clear in *Glasser* that convictions may not be reversed because the trial court appointed counsel to represent defendants jointly unless some prejudice to the defendants is shown. For the Court, while reversing *Glasser*'s conviction, refused to reverse Kretske's although both were represented by the same attorney. 315 U.S. at 77. The Court could not presume prejudice since there is nothing inherently undesirable in having one lawyer represent two defendants. In every joint trial there are considerations in favor of, and against, both joint and individual representation. The choice depends upon trial strategy and the relationship between the defendants. For example, the chances of an acquittal may be greater where one lawyer pursues a common defense strategy than where separate lawyers pursue different tactics. On the other hand, if defendants have conflicting interests, joint counsel might result in one defendant's separate argument not being presented.

Petitioner suggests (Pet. Br. 55-56) that, if he had had separate counsel, he might have tried to under-

mine co-defendant Sykes' defense and might have attacked his credibility. More specifically, he claims that his counsel might have emphasized Sykes' confession which did not implicate petitioner, attacked Sykes' credibility in general, and attempted to prove that Sykes put the incriminating materials in the automobile. But it is likely that counsel for Sykes would have counterattacked and assailed petitioner's credibility and defense. Under such circumstances, it is not inconceivable that Sykes might have testified against petitioner. Thus, there are reasons why petitioner might have preferred to have joint counsel with his co-defendants in order to present a consistent, unified defense. In these circumstances, in the absence of any objection, there is no basis for concluding that petitioner was prejudiced by the trial court's action. Never having raised the point, petitioner cannot now claim that he would have fared better if he had had separate counsel and attacked his co-defendants.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, *Petitioner,*

v.

UNITED STATES, *Respondent.*

REPLY BRIEF FOR PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1963

No. 163

JOHN BRENTON PRESTON, *Petitioner*,

v.

UNITED STATES, *Respondent*.

REPLY BRIEF FOR PETITIONER

Preliminary Statement and Summary of Argument

In its brief, the Government, admitting that "[o]n the bare record the case is close" (Br. p. 14), abandons the ground relied upon by the lower court but advances a number of new grounds to support the judgment. More specifically, while conceding that the officers did not have probable cause to arrest petitioner under the state vagrancy statute (Br. p. 18), the Government contends that the search and seizure here at issue were valid because: (1) the officers did have probable cause to arrest for violation of a municipal loitering ordinance; (2) while the record is unclear as to whether the arrest was actually made under the loitering ordinance, it should be presumed that it was; (3) at any rate, the arrest was valid as long as there was probable cause for an arrest for some crime, even though

not for the one the officers had in mind, and there was such probable cause here both with respect to the loitering ordinance and the state auto theft statute; (4) so far as the search and seizure are concerned, "although the point is not free from doubt" (Br. p. 24), they may be upheld as incident to an arrest for loitering; (5) at any rate, they were proper as incident to an arrest for auto theft; and (6) at any rate, they were proper entirely apart from the arrest because there was probable cause to believe the auto was stolen property.

The Government is wrong in all respects.

1. The record is clear that the officers arrested for vagrancy, not for loitering. There is a significant difference between the two provisions—the statute proscribes the acquisition of a status by repeated actions, whereas the ordinance proscribes a single act of loitering. The officers and prosecutors must be assumed to have known the difference and to have meant the vagrancy statute rather than the loitering ordinance when they spoke of the arrest for "vagrancy." Moreover, the burden of clarification, if clarification was needed, was on the prosecutor, who knew the true facts, not upon court-appointed counsel, who did not. See *United States v. Jeffers*, 342 U.S. 48, 51 (1951). ●

2. The Government cannot justify an arrest on grounds not considered by the arresting officer. In *Jones v. United States*, 357 U.S. 493 (1958), the Court rejected the similar argument that a search could be justified as incident to arrest on the ground that the record made clear that the officers' true purpose in entering the defendant's house had been to search, not to arrest. The same principle applies here: The officers must be held to their choice.

In any event, the question turns initially on the state law of arrest, and in Kentucky it is settled that the legality of an arrest depends upon the grounds assigned by the offi-

cer at the time of arrest, not upon whether he could have arrested on different grounds. *Gains v. Hudson*, 246 Ky. 517, 55 S.W. 2d 388 (1932); *Hogg v. Lorenz*, 234 Ky. 751, 29 S.W. 2d 17 (1930); other cases cited *infra*, p. 13.

3. Moreover, there was no probable cause to arrest petitioner either for loitering or for auto theft. As to the former, the ordinance is too vague to determine whether probable cause existed. And as to the latter, in addition to the consideration that the officers did not arrest for auto theft, the record indicates that there had been no report of theft of a car like Sykes' and that the officers had made no inquiry of the person from whom Sykes purchased the car. Moreover, parking for a long time in a downtown area at an unusual hour of the day would be the least likely thing for car thieves to do. Thus, while the conduct of the men obviously aroused the officers' suspicion, there was no basis for that suspicion to be related to auto theft.

4. At any rate, the Government's argument is made too late. Defense counsel was led by the officers' testimony to cross-examine and to introduce evidence in terms of the vagrancy statute, and petitioner would be prejudiced if the Government were to be free now to defend the arrest on different grounds. *Giordenello v. United States*, 357 U.S. 480, 488 (1958).

5. Assuming *arguendo* the validity of the arrest, the search and seizure were nonetheless illegal because: (a) With respect to an arrest for loitering, an accompanying search should not extend beyond that necessary to protect the officers and make the arrest secure. (b) In any event, the search was not sufficiently related to the arrest either in time or in purpose—the search was plainly an afterthought. (c) Moreover, there clearly was time to secure a warrant after the car had been taken to the garage; and to grant that the police in a proper case have authority to take a car into custody does not mean that they have the

4
further authority to break into the trunk without a warrant once the car is secure. *Rent v. United States*, 209 F. 2d 893, 894 (5th Cir. 1954). (d) No crime was committed in the presence of the officers.

6. The search cannot be justified apart from the arrest under the doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), not only because there was no probable cause and because the officers did not purport to search on the theory the auto had been stolen, but also because the *Carroll* doctrine applies only where there is danger that the auto might be moved. *Id.*, at 151, 153; *Rent v. United States*, *supra*.

7. Petitioner's silence cannot be taken as a waiver of his right to separate counsel, any more than was petitioner's silence in *Glasser v. United States*, 315 U.S. 60 (1942). As to prejudice, it is plain enough that there is a distinct possibility that petitioner was disadvantaged by the dual representation. The fact that on balance joint representation might conceivably have been helpful is immaterial, for petitioner was entitled to separate representation to decide this difficult question of strategy.

Argument

A. Validity of the Arrest

The arrest was invalid because (1) on this record, the only permissible conclusion is that the arrest was made for violation of the state vagrancy statute, as to which the Government no longer contends there was probable cause; (2) the arrest cannot be justified by an *ex post facto* consideration by the Court as to whether an arrest could have been made under some other statute; and (3) even if it were proper to consider other statutes, here there was no probable cause relating to any statute or ordinance.

1. *The arrest was made under the vagrancy statute.* The Government now maintains for the first time that the arresting officers might have had in mind a Newport loitering ordinance rather than the state vagrancy statute (Br. 15-16). The argument is that the loitering ordinance is really a vagrancy prohibition, and that the burden was on the petitioner to secure clarification as to what the officers meant when they referred to "vagrancy."

In the first place, the record does not require clarification. The initial fallacy in the Government's argument is its conclusion that the ordinance and the statute "cover essentially the same area" (Br. p. 15). Plainly, the elements of the provisions are not identical, and the Government does not suggest to the contrary. The question seems to be whether the differences are significant. They are.

The basic difference is that the Kentucky statute, as we pointed out in our opening brief (p. 18), falls into the general pattern of vagrancy provisions in that it makes a person's status, rather than his actions, a crime, whereas the ordinance is simply designed to permit the arrest of persons the police consider suspicious because of their conduct at the time, without regard to their past conduct. The fact that loitering is an element of both offenses (see subsections a and d of the statute) does not, as the Government appears to believe (Br. 15), support its argument. Rather, it supports ours, for in the statute the key word "habitual" is added to the word "loiters," thereby underscoring the essential difference between the provisions. For a similar indication of legislative awareness of this difference, see section 436.530, Kentucky Revised Statutes: "... If two or more vagrants habitually loiter about any street or public place, the officer shall disperse them. . . ."

One leading article describes vagrancy statutes in terms particularly appropriate here:

"The acts, or patterns of conduct, which constitute a proscribed status are of two types. First, there are those acts which, absent continued or habitual incidence, have no intrinsic criminal connotation, e.g., 'idleness,' 'wandering,' and 'loitering.' Such acts, otherwise innocent, may, however, through combination and repetition produce a criminal status. Second, status may be derived from acts which are usually criminal per se, e.g., 'begging', 'prostitution', 'gambling', and 'drunkenness'. When adopted as a course of conduct, these acts also produce a criminal status under the statutes." Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*. 37 N.Y.U.L. Rev. 102, 115 (1962). (Emphasis added; footnotes omitted.)¹

Thus, if it be assumed that the officers and the prosecutor understood the character of the statutes they were enforcing (as we submit it must), it should be concluded that, when the officers testified they arrested petitioner for "vagrancy" and when the prosecutor examined them about the "vagrancy" arrest, they were referring to the only true vagrancy statute within their jurisdiction. This conclusion is given added support, of course, by the fact that the statute and ordinance carry different names and that all of the officers, as well as the prosecutor, referred to the crime of "vagrancy," not that of "loitering." Finally, while the details of the officers' testimony are not particularly illuminating with respect to this question, statements such as "some of [the defendants] hadn't been employed for six months . . . so we arrested them for vagrancy" (R. 9) are

¹ See also the other authorities cited on page 28 of our opening brief.

more consistent with a charge of the status crime of vagrancy than of the crime of loitering.

Assuming *arguendo*, however, that the record is not clear as to whether the arrest was for vagrancy or for loitering, we submit that the Government is quite mistaken in urging that the burden of clarification was petitioner's. On the contrary, petitioner's counsel did all that should be expected of him when, to use one example, he examined the officers as follows:

"Q. You placed them under arrest?"

"A. Yes.

"Q. May I ask what charge you placed against them?"

"A. We charged them with vagrancy.

"Q. Vagrancy?"

"A. Yes, sir." (R. 8).

This response, together with like testimony from the other officers (R. 14, 20, 25), reasonably led petitioner's counsel to conduct his examination of witnesses in terms of the vagrancy statute. Thus, as we indicated in our opening brief (pp. 13-14), petitioner's counsel introduced detailed testimony as to the efforts of the defendants to secure employment, which was relevant to whether they had "habitually fail[ed] to engage in honest labor" or had "habitually refuse[d] to work" within the meaning of the vagrancy statute, but which would hardly have been relevant to whether they had a "legitimate business" at the time of the arrest under the loitering ordinance. (They were all then unemployed, it will be recalled.) Again, petitioner's counsel introduced evidence tending to prove that the defendants had not deserted their wives and family or habitually failed to engage in labor for their support. While this was evidence relevant to subsections 2(b) and

2(c) of the state statute, it had nothing to do with the loitering ordinance.

What the Government contends in effect is that petitioner's counsel was not sufficiently diligent in examining the officers. He should have asked, "When you say 'vagrancy,' do you mean the vagrancy statute or the loitering ordinance?" Apparently the Government believes that this might well have elicited the response, "I mean the loitering ordinance." If it had, it seems that even the Government would have been surprised at one point, since in the response to the petition for certiorari the Government assumed that the provision in question was the vagrancy statute (Govt. Opp., p. 7). We say that, if the officers misspoke, it was the prosecutor's responsibility to make matters clear. After all, the police and the prosecutor knew the facts, while petitioner's court-appointed attorneys did not. But all that the prosecutor did was to examine in terms of a "vagrancy" arrest (R. 9, 16, 23), which could do nothing but confirm petitioner's counsel in their view as to the statute involved.

In such circumstances, the rule announced in *United States v. Jeffers*, 342 U.S. 48, 51 (1951), is especially appropriate:

"Over and again this Court has emphasized that the mandate of the Amendment requires adherence to judicial processes. . . . Only where incident to a valid arrest . . . or in 'exceptional circumstances' . . . may an exemption lie, and then the burden is on those seeking the exemption to show the need for it. . . ." (Emphasis supplied.)

2. The arrest cannot be justified on the basis of an ex post facto determination that the officers could have arrested petitioners for the crimes of loitering or car theft. The Government maintains that, although the officers did not

have probable cause to arrest for vagrancy, and assuming they did not determine they had probable cause to arrest for any other crime, the arrest was nonetheless valid if in fact it appears to the Court that there was such probable cause respecting other crimes. The other crimes the Government suggests are loitering and car theft. In a later portion of the brief, we show that there was no probable cause respecting either crime. Here, we discuss the validity of the Government's "alternative probable cause" argument. That argument is unsound because (a) it squares neither with the Constitution (b) nor with the Kentucky law of arrest, and (c) in any event it is made too late in this case.

a. The Constitutional issue raised by the Government's argument is whether the requirements of the Fourth Amendment, so far as they pertain to arrests, can be met where the record discloses that, while the officers arrested for a crime as to which there was no probable cause and did not determine there was probable cause to arrest for any other crime, in fact it appears that there was. This is the question left open by the Court in *United States v. Di Re*, 332 U.S. 581 (1948),² except that here the Government's argument goes even further than in *Di Re*, since there the record did not disclose what crime the officers had in mind when they arrested. Because, as we show later, this question is not properly presented in this case any more than it was in *Di Re*, we discuss it only briefly.

While *Di Re* does not dispose of the Government's argument, in principle *Jones v. United States*, 357 U.S. 493 (1958), does. There a search and seizure were declared invalid because, although the officers had probable cause to

² "Assuming, without deciding, that an arrest without a warrant on a charge not communicated at the time may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed. . . ." *Id.*, at 592. The Court held the arrest invalid on other grounds.

believe that liquor was being illegally distilled in a house, they searched the house at night with only a daytime warrant. In this Court, the Government for the first time attempted to sustain the search on the ground that it was reasonable to infer that the officers, in entering the house, were intent upon arresting rather than searching; that they had probable cause for such an arrest; and that once properly in the house they could seize all contraband in plain view. While unquestionably the officers did have probable cause to arrest, the Court nonetheless concluded that the Government's argument was not well founded because "[t]he testimony of the federal officers makes clear beyond dispute that their purpose in entering was to search for distilling equipment, and not to arrest petitioner." *Id.*, at 500.

Jones is identical in all material respects to the case at bar. In *Jones*, the objective facts would have supported an entry to make an arrest, just as here we assume for present purposes the objective facts would have supported an arrest for loitering or for auto theft. But in *Jones* the Court rested upon the fact that the officers had not intended to arrest but rather to conduct a search which turned out to be illegal, just as here the Court should rest upon the fact that the officers intended to arrest for a crime as to which there was no probable cause rather than for other crimes.²

² *Chapman v. United States*, 365 U.S. 610, 616 (1961), stands for the same principle as *Jones*, upon which it heavily relies. There the Court held that an entry into a house by a landlord and police for the purpose of making a search could not be justified on the ground that under local law the facts would have justified an entry for a different purpose—to view waste.

And see *United States v. Burke*, 215 F. Supp. 508, 510-511 (D. Mass. 1963), in which an arrest was held illegal, although an arrest for intoxication apparently would have been lawful, where there was no evidence that the arrest had been made for intoxication, and where the officers had no probable cause for believing that the person arrested was guilty of mail robbery, the crime under investigation.

The decisions the Government cites to support its contention that "it is clear that an arrest may be upheld on a theory which was not in the minds of the arresting officers" (Br. p. 27) are entirely beside the point, for in each of them the arrest was made for the crime that was in the minds of the officers.

The principle of *Jones*—that the officers must be held to their choice—is a sound one. In the first place, there is considerable sense in entrusting the initial determination, whether for or against arrest, to the officer on the spot. Undoubtedly the Government has from time to time argued that in a close case considerable deference should be paid the judgment of the officer who determined to make an arrest, since it is not always possible to recreate in a courtroom the atmosphere that existed at the time of the arrest. Similarly, where the officer did *not* conclude that there was probable cause, deference should be paid to that judgment as well. Moreover, the rule contended for by the Government would open the door to grave abuse. It is not likely that an officer will commit deliberate perjury. If, however, the prosecution could, months after the arrest, justify it on a basis not considered, and by hypothesis even rejected, by the arresting officer at the time of the arrest, there would be strong temptation for the officer to recall or to emphasize or to color facts not deemed significant at the time. There are safeguards against such distortions provided by such requirements as "booking", preliminary hearing, and statutory mandates to advise the person of the charge against him at the time of the arrest.⁴ These procedural safeguards, however, afford no protection if later justifi-

⁴ Kentucky has such a statute. See note 7, *infra*. See also *United States v. Di Re*, 332 U.S. 581, 588 (1948) in which some members of the Court were of the view that failure of the arresting officers to comply with a New York notice statute invalidated the arrest.

cation may be placed on wholly different grounds from those charged at the time of the arrest.

b. Entirely apart from constitutional considerations, the law of Kentucky appears to foreclose the Government's argument in this case. It is quite clear, of course, as the Government states, that "[t]he power of local police officers to make an arrest is determined by local law even in cases involving the federal constitutionality of a search. *Ker v. California*, 374 U.S. 23; *United States v. Di Re*, 332 U.S. 581" (Br. p. 16). Unaccountably, however, the Government fails to discuss whether in Kentucky an arrest is valid if there was probable cause to arrest for a crime different than that charged by the officer, but not for the crime for which the person was actually arrested.⁵ The answer is that, as the Kentucky Court of Appeals has held on a number of occasions and as is suggested by the passage from *Giannini v. Garland*, 296 Ky. 361, 367, 177 S.W.2d 133 (1944), set out in the Government's brief (p. 17), such an arrest is not valid.⁶ The leading Kentucky decisions are

⁵ The Government does discuss (Br. pp. 16-17) an argument in our opening brief relating to the Kentucky law of arrest. There we contended that it appeared that, for the arrest to be valid under Kentucky law, the offense of vagrancy would actually have had to be committed (Br. pp. 25-27). That is, reasonable cause would not be enough. We relied upon the language of the Kentucky arrest statute, as well as upon certain state search and seizure decisions. We distinguished the state decisions that adopted a contrary view on the ground that (a) the opinions disclosed they were based upon a separate drunkenness and disorderly conduct statute, and (b) they were all false arrest damage cases, and the Kentucky Court of Appeals has indicated it applies a more liberal standard in such cases than in search and seizure cases.

⁶ The Government's response is that in *Giannini v. Garland*, *supra*, the court "explain[ed] most of the arrest cases cited by petitioner" (Br. p. 17). This decision explains none of those cases, because it was (a) a false arrest damage case which (b) involved an arrest for public drunkenness.

⁷ The passage from *Giannini* is as follows:

"[A]n officer may arrest a misdemeanant without a warrant upon the ground that the offense was committed in his presence when he has reason-

Goins v. Hudson, 246 Ky. 517, 55 S.W.2d 388 (1932); *Hogg v. Lorene*, 234 Ky. 751, 29 S.W.2d 17 (1930); *Wright & Taylor v. Leigh*, 229 Ky. 32, 16 S.W.2d 493 (1929); and *Noe v. Meadows*, 229 Ky. 53, 16 S.W.2d 505 (1929).

Thus, in *Goins v. Hudson*, a false arrest action, there was evidence that the plaintiff had committed two offenses in the arresting officer's presence: public drunkenness and profane cursing and swearing. The officer testified that he had made the arrest for drunkenness. The trial court instructed the jury that the arrest was lawful if the officer had reasonable grounds for believing the defendant guilty of committing either offense in his presence. On appeal, the instruction was held erroneous, in part because, as the court said:

"The instruction . . . told the jury that Hudson had the right to arrest Goins if either he profanely cursed or swore, or was publicly drunk in his presence, or Hudson had reasonable grounds to believe that Goins was publicly drunk or profanely cursed and swore in his presence. Hudson admits that he arrested Goins for drunkenness, and for no other reason, and so informed Goins. That being true, *he could not justify upon another ground which did not cause him to make the arrest.* [Citing *Hogg v. Lorenz* and *Noe v. Meadows*.] It follows that the question of profane swearing should not have been included in the instruction." 246 Ky., at 522-523. (Emphasis added.)

able grounds to believe, and did believe in good faith' that the person arrested was guilty, but the foundation for such reasonable belief must be based and deduced from facts obtained by the officer through some one or more of his senses and not from information he may have received from third parties." 296 Ky., at 367 (quoting *Goins v. Hudson*, 246 Ky. 517, 55 S.W. 2d 388 (1932) (emphasis added)). See also *Sisemore v. Hoskins*, 314 Ky. 436, 439, 235 S.W. 2d 1011 (1951); *Couch v. Vanhoose*, 314 Ky. 36, 43, 234 S.W. 2d 169 (1950).

Hogg v. Lorens shows that the same rule applies in a case like this, where officers arrest for one misdemeanor (vagrancy) and it is claimed that the arrest could have been made for a different misdemeanor (loitering) or for a felony (car theft). In *Hogg*, the plaintiff in a false arrest action alleged that the defendant had wrongfully arrested him for a breach of the peace. The defendant contended that the plaintiff inferentially conceded a lawful arrest because he did not allege in his complaint (1) that no offense had been committed in the officer's presence, and (2) that the officer did not have reasonable grounds for believing that a felony had been committed. That contention was rejected for the following reasons:

"[The complaint] does charge that the officer falsely asserted that plaintiff had committed a breach of the peace in his presence, and wrongfully arrested him for that reason. In view of the specification of the very ground upon which the deputy constable assumed to act, it was necessary to negative only that particular assertion of authority. [Citing *Noe v. Meadows*.] If the officer acted upon one ground, he could not justify his act upon another, although he was free to avail himself of all the grounds which actuated his conduct. *Waddle v. Wilson*, 164 Ky. 228, 175 S.W. 382. It is the duty of an officer who proposes to make an arrest to inform the person about to be arrested of the offense charged against him (Criminal Code of Practice, sec. 39). . . ." 234 Ky. at 756. (Emphasis added.)

Indeed, in *Wright & Taylor v. Leigh*, the Kentucky court held, in substantially similar language, that an arrest for

¹ Section 39 of the Kentucky Criminal Code of Practice, now K.R.S. 431.025, applies equally to felony and misdemeanor arrests, and provides in pertinent part: "The person making an arrest shall inform the person about to be arrested of the intention to arrest him, and of the offense for which he is being arrested."

loitering, a misdemeanor, could not "be justified by showing that there were reasonable grounds for belief that a felony [burglary] had been committed" 229 Ky., at 34. And in *Nos v. Meadows*, the court applied the same rule in the converse of that situation—at the time of the arrest, the arresting officer had told the plaintiff that he was arresting him for possession of a stolen automobile, a felony, but when sued for false arrest, testified that he made the arrest because the plaintiff was using license plates issued for another car, a misdemeanor. The court stated that the defendant had not informed the plaintiff that such was the charge at the time of the arrest, observed that the officer's conduct had been inconsistent with an arrest for the lesser offense, and noted that the evidence showed that the officer first discovered the latter offense after making the arrest. But in any event, the court continued:

"The general rule is that, if an arrest without process is made on one ground, upon which it subsequently develops it cannot be sustained, the arrest cannot later be justified on the theory that another ground existed at the time of the arrest. 25 C.J. 496. sec. 67; *Malcolmson v. Scott*, 56 Mich. 459. 23 N.W. 166; *Snead v. Bonnoil*, 166 N.Y. 325, 59 N.E. 899; *Comisky v. N. & W.R. Co.*, 79 W. Va. 148, 90 S.E. 385; *Jones v. Van Bever*, 164 Ky. 80, 174 S.W. 795

"If, however, an arrest be actually made upon more than one ground, and justification be found in one ground only, that one ground may be relied on as a defense. 25 C.J. 496; *Waddle v. Wilson*, 164 Ky. 228, 175 S.W. 382.

"In this case the action taken by [defendant] was upon the ground that [plaintiff] was guilty of the crime of having a stolen automobile in his possession, and he

was bound to make good on the basis on which he proceeded or suffer the consequences. He could not rely upon an offense which he discovered after the arrest had been made, and which did not actuate him in making the arrest." 229 Ky., at 57-58. (Emphasis added.)⁸

Thus, under Kentucky law, the arrest in this case for vagrancy was unlawful because, as the Government concedes, the officers had no grounds for making an arrest under the vagrancy statute. Under Kentucky law, the alleged existence of other grounds which "did not actuate [the officers] in making the arrest" does not affect that conclusion.⁹

c. Finally, assuming that everything we have said to this

⁸ For similar cases in other jurisdictions, see *McNeff v. Heider*, 216 Ore. 583, 337 P.2d 819, 823 (1958); *Donovan v. Guy*, 347 Mich. 457, 80 N.W. 2d 190 (1956); *Moran v. City of Beckley for Use of Bowen*, 67 F.2d 161, 163 (4th Cir. 1933); *Lyons v. Worley*, 152 Okl. 57, 4 P.2d 3 (1931); *Geldon v. Finnegan*, 213 Wis. 539, 252 N.W. 369 (1934); *Schultz v. Eslow*, 201 Iowa 1083, 205 N.W. 972 (1925); 35 C.J.S. 681; Annot., *Justification in Action for False Imprisonment by Proof of Existence of Ground Other Than That on Which Arrest Was Made, or One of Several Grounds on Which It Was Made*, 64 A.L.R. 653 (1929).

⁹ It is true that these Kentucky cases all involved false arrest claims rather than search and seizure issues. However, the issue in each of the cases, as here, was the legality of the arrest, and no reason appears why the Kentucky courts would hold arrests illegal for false arrest purposes but legal for search and seizure purposes. Indeed, as we have indicated in our opening brief (p. 27), the Kentucky Court of Appeals has stated that "the code provisions authorizing arrest without a warrant have been construed with more particularity and perhaps with less liberality in upholding the legality of such arrests" where the issue is the legality of a search and seizure than where the issue is the legality of the arrest for false arrest purposes. *L. & N. R. Co. v. Creech*, 218 Ky. 147, 151, 271 S.W. 674 (1927). Moreover, since a substantial constitutional question would be raised by giving the Kentucky arrest statute the construction contended for by the Government, there is all the more reason for this Court to conclude that the statute means in this case exactly what the Kentucky courts have held it to mean in the cases cited in the text.

point is incorrect, nonetheless the Government's argument comes too late. As we have noted, until its brief in this Court the Government never suggested that the arrest could be justified except as an arrest for vagrancy. In consequence, as we have already indicated, defense counsel devoted their efforts to attacking the validity of the arrest in terms of the vagrancy statute. Therefore, were the Government now to be permitted to defend the arrest in terms of the loitering and auto theft statutes, petitioner would be deprived of an opportunity to examine the police and introduce evidence respecting the alleged probable cause for concluding that he had committed those crimes. This opportunity might be critically important. Thus, for example, in connection with the auto theft statute, counsel could have asked the officers if they had had any report of a theft of a vehicle fitting the description of Sykes' car (the answer would have been "No") or whether they had checked with the person from whom Sykes had purchased the car (the answer would have been "No"). And, in terms of the loitering statute, they could have asked the officers what it was at the time of arrest that they considered "disolute," "idle," "loafing," or "disreputable" about the petitioner. Again, under the Government's argument it should be assumed that the officers' reply would have been "Nothing." Plainly, even assuming there are now facts of record from which the Court could conclude that there was probable cause to arrest for such crimes, it cannot be said that answers of this type from the officers would not change the picture.

Just this type of situation was involved in *Giordenello v. United States*, 357 U.S. 480 (1958). There the Government, having attempted in the lower courts to justify a search on the basis of a warrant, attempted in this Court

to justify it also as a search incident to an arrest. The Court responded:

"We do not think that these belated contentions are open to the Government in this Court To permit the Government to inject its new theory into the case at this stage would unfairly deprive petitioner of an adequate opportunity to respond. This is so because in the District Court petitioner, being entitled to assume that the warrant constituted the only purported justification for the arrest, had no reason to cross-examine Finley or to adduce evidence of his own to rebut the contentions that the Government makes here for the first time." *Id.*, at 488.

3. *There was no probable cause for arresting petitioner for loitering or car theft.* Assuming *arguendo* that the Government may raise its "alternative probable cause" argument here for the first time and that it is valid, the fact remains that there was no probable cause for arresting either for loitering or for car theft.

a. As to loitering, the principal reason that probable cause cannot be found is that it is impossible to ascertain what the statute means. The Government attempts to brush aside the unconstitutionality question by asserting that arresting officers should not be required to make this sort of judgment (Br. p. 22). Putting aside the question whether this approach might ever be valid, surely it is not where the nature of the constitutional infirmity—vagueness—precludes an informed judgment as to whether there was probable cause to arrest.

As to the constitutionality argument as it applies to the loitering ordinance, we rely upon the discussion in our opening brief (pp. 35-40), which is as applicable to the

ordinance as it is to the vagrancy statute.¹⁰ The Government's attempt to supply definiteness to the ordinance is as follows: "[E]ven if the ordinance is vague in its outer contours," at its core it is "plainly aimed at persons who, having no employment or legal source of income, remain on the streets without any valid reason for their presence." Or, phrased differently, while "ordinary standing or sitting is not prohibited . . . loitering in a suspicious manner" is (Br. pp. 19 n. 9, 20, 22).

We are quite willing to submit the question of constitutionality in these terms. Either test suggested by the Government (and they are different) gives the police *carte blanche* to arrest anyone of whom they are suspicious. The standard of probable cause to believe a person has committed a particular crime would be supplanted by the test of probable cause *to be suspicious* that a person *may* commit *any* crime. Or, to put it differently, it would be a *crime* (not just grounds for interrogation to act in a suspicious manner "around the streets or within the limits of the City of Newport.")

While the Government contends that the "defendants' conduct in this case was the kind of conduct at the heart of the ordinance no matter how narrowly it might be read" (Br. p. 20), this serves only to illustrate how impossible it is to read the ordinance "narrowly." After all, so far as the police were aware (and so far as the facts appear to have been), the defendants simply had sat in an auto for some hours early in the morning and were unable to give what the police considered a satisfactory explanation for their presence. Surely the protection against arbitrary

¹⁰ We note that the Government attempts to distinguish *Edelman v. California*, 344 U.S. 357 (1953), on the ground that it involved a statute "entirely different [from] and more ambiguous [than]" the loitering ordinance (Br. p. 21 n. 12). The critical phrase in the *Edelman* statute was "a dissolute person," whereas here a person is guilty if he loiters "in [a] . . . dissolute . . . way."

police action that is conferred by the Fourth Amendment must forbid arrest, incarceration, and search and seizure based on such flimsy grounds, entirely apart from the consideration that the Government concedes that the ordinance purports to invest the police with even broader authority.

As we have suggested, the consequence of this ambiguity of the ordinance is not only that it is unconstitutional, but that it is impossible to determine whether or not the police had probable cause to arrest petitioner for its violation. We submit that it defies analysis to assess the evidence of record in terms of whether there was probable cause to conclude that the petitioner had loitered in an "idle, dissolute, disreputable or loafing way," or to conclude that he did not have "a legitimate business or visible means of support." Granting that he was loitering, considerably more is needed under the ordinance, as the Government says. But what is it? Is it sufficient that petitioner was unemployed, or must the police have believed that he was engaged in an illegitimate enterprise? What is loitering in an "idle" or "loafing" way as opposed to simply loitering? In short, however the vagueness problem be put, it cannot be avoided in this case if the arrest is to be measured in terms of the loitering statute; and we submit that the conclusion must be that the arrest was invalid because it cannot be said that there was probable cause.

b. There also was no probable cause to arrest petitioner for car theft. The Government observes that the defendants could produce no registration papers; but if this were a weighty consideration, we hazard the guess that great numbers of innocent people would risk arrest every day. The Government points out that the defendants had hardly any money with them and had been unemployed; but we suggest that the inference that a person in that situation probably has stolen whatever he has acquired recently if

it is worth a few hundred dollars (the auto was worth \$341.25 (R. 118)) is too strained. The Government suggests that it is significant that the defendants were parked in a central business area for a number of hours at an odd time of the morning; but we suggest that this would be one of the least likely things for a car thief to do. Finally, the Government points out that the defendants gave answers to the officers that they considered "evasive." But, while this served to arouse the officers' generalized suspicion that the men "[w]ere up for no good" (R. 18), it apparently never occurred to the officers, nor should it have, that the particular "no good" was auto theft.

More significant even than what appears of record is what does not. The officers did not testify, for example, whether there had been any report of the theft of an auto fitting the description of Sykes' car; whether they had telephoned the station to see whether there had been any such report; or whether prior to the arrest they had telephoned the person from whom Sykes had purchased the car. If the officers had gone before a magistrate with the information they had, and had admitted that they did not have any information of the type outlined above, the magistrate would have, or at least should have, refused a warrant of arrest for car theft. And, of course, our contention is given considerable support by the fact that the officers did *not* arrest the defendants for auto theft."

¹¹It is, to be sure, artificial to discuss this question as if the arrest had been made for auto theft. However, this is inevitable because of the artificiality of the Government's arguments, as is illustrated by passages in the Government's brief such as: "It is worth speculating as to what the officers should have done rather than arrest the three defendants [for car theft]." (Br. p. 32). In fact, we need not speculate. The officers did precisely the right thing: They did not arrest for auto theft.

B. Validity of the Search and Seizure

The Government's argument is that the search and seizure were valid because they were incident to the arrest for loitering or for car theft, and that they were also valid apart from the arrest because the officers had probable cause to believe the auto had been stolen.

1. *The search and seizure cannot be justified as incident to the arrest.* In the first place, for the reasons given above, the arrest was invalid, and hence the search and seizure cannot be upheld as incident thereto. In addition, the search and seizure were invalid for the reasons set forth in our opening brief at pp. 41-54. We discuss those reasons here only briefly in the context of the Government's argument.

a. Our contention that a search incident to an arrest for Vagrancy should be limited in scope to that which is necessary to protect the arresting officer and to make the arrest effective (Br. pp. 43-47) is applicable, of course, to an arrest for loitering. The Government responds:

"We suggest, although the point is not free from doubt, that, having made a valid arrest for vagrancy, the officers could search for instrumentalities and fruits of closely related crimes, such as assault and robbery. This is not, of course, to argue that officers are free to conduct a general search whenever they make a valid arrest." Br. p. 24.

Whatever the Government's argument may mean in other contexts, it means clearly enough that officers are to be free to conduct a general search whenever they arrest for vagrancy. And, given the character of many vagrancy statutes as vehicles for arrest on suspicion (see our open-

ing brief p. 31 n. 22), and in particular the character of the Newport loitering ordinance as construed by the Government (see *supra*, p. 19), this authority would be wholly inconsistent with the purpose of the Fourth Amendment to preclude general searches (see opening brief p. 44 and authorities there cited).

b. We also argued in our opening brief (pp. 47-49, 51-53) that the search and seizure were not valid because not contemporaneous with the arrest. The Government responds that the delay was slight, and that "[i]f the right to search the car existed at all, it included the right to search at a safe and suitable place" (Br. p. 24). While the question cannot be answered with certainty on the basis of precedent (compare the decisions cited in our opening brief, pp. 47-49, 51-53, with those cited by the Government, pp. 24-25), we submit that our position is the more reasonable. If the right to search incident to arrest is not confined to a search strictly contemporaneous with the arrest, so that the principal legitimating purpose of the search is to protect the officers and secure the arrest, it is difficult if not impossible, to ascertain where the right terminates in a case like the one at bar.¹² If a search can be conducted after the car has been removed to the police garage as long as it is made within half an hour, why not if it is made within half a month? It might be argued, as the Government appears to, that officers should have the right to "search [the auto] in a sheltered, lighted area without the necessity of watching three men on the street late on a winter night." But in the case at bar, the search was not

¹² Of course, as the Court noted in *Abel v. United States*, 362 U. S. 217, 230 (1960), where the person arrested takes property with him to the station, that property may be searched there, "as the search of property carried by an accused to the place of detention has additional justifications, similar to those which justify a search of the person of one who is arrested."

only removed from the arrest in terms of time, but more important, removed in terms of purpose. That is, there is no indication whatever that the officers intended to search the auto when they arrested the defendants. Rather, the search appears to have been only an afterthought. In such circumstances, we submit that the rule requiring a warrant should apply, not the incident to arrest exception.

c. We also argued in our opening brief that a further consideration indicating the unreasonableness of the search and seizure was that the police indisputably had ample time to secure a warrant after the car was taken into custody (Br. pp. 49-51). The Government's response is that they had no time to secure a warrant *at the time of arrest*, and that this is the only relevant time because "the officers had no right to move the automobile unless they could, contrary to petitioner's position, either seize or search it" (Br. 26). We do not agree with this all-or-nothing approach to the Fourth Amendment. We believe that, in a proper case, the police might well have the right to remove a car to a safe place without a warrant, but that this right should not carry with it the right to break open the trunk and seize whatever is inside without first securing a warrant. See *Rent v. United States*, 209 F.2d 893 (5th Cir. 1954), where as to such a question the Court stated:

"That probable cause . . . may very well have authorized the officer to take the automobile into custody, but we do not think that it justified him in searching the automobile a number of hours after the arrest and without a search warrant for which an application could then easily have been made." *Id.*, at 898.

d. Finally, we urged in our opening brief (p. 53) that relevant to the reasonableness of the search is the fact that no crime of vagrancy was committed in the presence

of the officers. We need add only that, so far as loitering is concerned, the same argument is applicable because the vagueness of the ordinance makes it impossible to determine whether defendants violated it; and, so far as auto theft is concerned, the record establishes that no such crime was committed.

2. *The search and seizure cannot be justified on the theory that there was probable cause to believe the auto had been stolen.* The Government's argument concerning the validity of the search and seizure independent of the arrests is unsound because:

First, as we have already indicated (*supra*, pp. 20-21), there was no probable cause to believe the car had been stolen.

Second, the officers did not purport to conduct the search or to seize the articles on the theory that the car had been stolen, and consequently, for the reasons set forth above (pp. 8-18) in connection with the Government's "alternative probable cause" argument, the Government is foreclosed from relying on such a theory now.

Third, in any event the search of a car in police custody should not be countenanced without a warrant.

So far as we have been able to discover and so far as the Government suggests, this Court has never held that the doctrine of *Carroll v. United States*, 267 U.S. 132 (1925), is applicable except where the car is truly "movable," i.e., where it is in control of someone other than the police. As is stated in one of the decisions cited by the Government, *United States v. Walker*, 307 F.2d 250, 252 (4th Cir. 1962), "the basic reason for the Carroll doctrine [is] that a vehicle by its very nature can be quickly moved out of the locality or jurisdiction in which the warrant might be sought" This view of the rationale of *Carroll* is

based upon the language used by the Court in that case, which could hardly be more clear. Thus, the Court stated that historically there has been a distinction drawn "as to the necessity for a search warrant between goods . . . when concealed in a dwelling house or similar place, and like goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant." *Id.*, at 151. And again:

"... [T]he guaranty of freedom . . . by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought." *Id.*, at 153.¹²

Once more the Government's argument appears to turn upon its theory that, if the police had the right without a warrant to take the auto into custody by putting it in a garage, they also had the right to search it without a warrant. As we have already indicated, we do not believe that this is so. See discussion *supra*, p. 24. Rather, as the Court of Appeals for the Fifth Circuit held in *Rent v. United States*, 269 F.2d 893, 898 (1954), while the *Carroll*

¹² In *Brinegar v. United States*, 338 U.S. 160 (1949), the search took place after the police overtook the suspect in a chase; in *Husty v. United States*, 292 U.S. 694 (1931), the search took place after the suspect had entered his car, started it, and was about to drive away; and in *Scher v. United States*, 305 U.S. 251 (1938), while the suspect had driven the car into his garage immediately before the search took place, the Court emphasized that "[e]xamination of the automobile accompanied an arrest, without objection and upon admission of probable guilt." *Id.*, at 255.

doctrine may justify the police in taking an auto into custody, once it is secure it is no different than a house with respect to the warrant requirement.¹⁴

C. Deprivation of Assistance of Counsel

The Government's reply to our contention that the appointment of counsel to represent the three defendants jointly was at odds with *Glasser v. United States*, 315 U.S. 60 (1942), is that the issue is not properly before the Court because it was not raised in the lower courts or in the petition for certiorari; that in *Glasser* the counsel had objected to his double appointment, whereas here there was objection neither by petitioner nor by the attorneys; and finally that no prejudice is shown (Br. 40-41).

As to the failure of counsel to object in the trial court and to raise the issue in the Court of Appeals, this might have been due to the very conflict of interests in question. That is, dual representation may have been helpful to Sykes—one of the clients—but harmful to petitioner, as we suggested in our opening brief (pp. 55-56). This would probably not have been apparent to the attorneys immediately upon appointment; and if it became apparent thereafter, whose interest would they choose to serve?

And so far as petitioner's failure to object is concerned,

¹⁴ We suggest that there is considerable difficulty with the Government's theory that the Court need not go as far here as in *Carroll* because here, as opposed to *Carroll*, "there was no need to search an automobile which was not itself contraband while looking for contraband" (Br. 39). On the contrary, entirely apart from the matters discussed in the text, to sustain the search the Court would have to go further here than in *Carroll* precisely because the search was not aimed at discovering contraband. Assuming (contrary to fact) that the search was based upon the belief that the auto was stolen, what could the officers have been looking for except evidence of commission of a crime, as opposed to contraband or the means of commission of a crime? But, as this Court has consistently held, a search may not be made for articles that are "merely evidentiary." See authorities cited in our opening brief, p. 42, n. 28.

while it may be true that "[i]n every joint trial there are considerations in favor of, and against, both joint and individual representation" (Govt. Br. p. 41), this is hardly a judgment (one of "trial strategy" as the Government describes it) that should be made by the lay defendant. Petitioner was entitled to separate counsel to advise him as to this very point, and in the absence of such independent counsel he cannot be held to have waived the issue. Glasser was, after all, an attorney who served as an Assistant United States Attorney for more than four years, *id.*, at 88; and even in such circumstances the Court held that there had been no waiver by him even though, after an initial objection by him and a consequent withdrawal of the suggested appointment by the judge, Glasser remained silent when the attorney and the other defendant later told the judge that the appointment would be satisfactory.

So far as prejudice is concerned, as we indicated in our opening brief (pp. 55-56) there is in this case a distinct possibility of harm. Indeed, the Government does not appear to contend to the contrary, but contents itself with observing that there is also a possibility that petitioner was advantaged by the dual representation. Assuming this to be so, where it cannot be said whether there was prejudice or advantage, we urge that the proper course is reversal, not affirmance.

We do wish to note our hope, however, that the Court will dispose of the search and seizure issues before reaching this counsel contention, because a reversal on the latter ground alone would subject petitioner to the possibility of another trial at which the evidence here in question would again be offered. Especially in a case in which the conviction, even considering the evidence seized from the car, rests upon exceedingly flimsy grounds, we urge that such a possibility should be foreclosed.

One final point: The Solicitor General states in the Government's brief that he "has had some concern" with respect to the sufficiency of the evidence, but that he "has concluded that the case against petitioner was sufficient to warrant its submission to the jury" (Br. p. 12, n. 5). While we have not argued this issue separately, we have described the evidence and recorded our grave doubt as to its sufficiency (Br. pp. 16-19). After giving the matter considerable thought, we concluded that, while we share the Solicitor General's concern as to this issue, the other contentions open to petitioner are considerably stronger and, moreover, are presumably the issues that moved the Court to grant certiorari. Nonetheless, this point is, of course, open to the Court, and we naturally stand prepared to discuss the question should the Court so desire.

Conclusion

For the foregoing reasons, as well as for the reasons given in our initial brief, the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

Respectfully submitted,

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(300-4)